91-1294

Case No. _____

Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

RUTH A. PARKER

Petitioner,

vs.

STATE OF NEW JERSEY
Attorney General of New Jersey,
Robert J. Del Tufo

Respondent,

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Whether the courts below erred in holding that the Petitioner received a fair trial in light of the vagueness of the indictment, the confusing and contradictory trial testimony, the disturbing nature of the numerous allegations, and the vagueness of the official misconduct statute created a real danger of jury confusion?

II. Whether Defendant's conviction of official misconduct violates her constitutional right to a unanimous jury verdict is in violation of the Sixth and Fourteenth Amendments?

III. Whether a state may avoid a Defendant's exercise of her Eighth and Fourteenth Amendment rights under Schad v. Arizona by misapplication and/or assertion of waiver by Trial Counsel?

IV. Whether Defendant was denied a fair trial?

V. Whether Count I of the indictment violates the Fifth Amendment?

PARTIES TO THE PETITION

RUTH A. PARKER, Petitioner

STATE OF NEW JERSEY
ATTORNEY GENERAL OF NEW JERSEY,
ROBERT J. DEL TUFO, Respondant

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DISCLAIMER:

Parts of the within Petition have been taken from other soures including previous Briefs and Decisions in this matter; the Petition for Schad v. Arizona, as well as other sources.

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IN THE
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OCTOBER TERM, 1991

RUTH A. PARKER

Petitioner,

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STATE OF NEW JERSEY
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Robert J. Del Tufo

Respondent.

PETITION FOR A WRIT OF CERTIORARI

Petitioner Ruth A. Parker respectfully prays that a writ of certiorari issue to review the judgment of the New Jersey Supreme Court entered in this proceeding on July 17, 1991. (Reconsideration Motion denied September 4, 1991)

OPINIONS BELOW

STATE OF NEW JERSEY, PLAINTIFF-RESPONDENT, V. RUTH PARKER, DEFENDANT-APPELLANT

Decided July 17, 1991

124 N.J. 628 and 592 A.2d 228.

JURISDICTION

A judgment of conviction and order of commitment was entered in the Superior Court of New Jersey, Law Division, Hudson County Criminal Part, on March 12, 1987, by the Hon. Kevin G. Callahan, J.S.C., after a trial by jury wherein she was found guilty of official misconduct in violation of N.J.S.A. 2C:30-2a being Count I of State Grand Jury Indictment number 763-6-86 filed on June 11, 1986.

On June 6, 1990 a Majority of the Appellate Division affirmed Defendant's conviction and sentence. State v. Ruth Parker, Docket No. A-4181-86T2. The Hon. Richard S. Cohen, J.A.D., dissented on the ground that the jury instructions violated Defendant's right to a unanimous jury verdict (Appendix B). A Notice of Appeal was filed on July 6, 1990 to the New Jersey Supreme Court as a matter of right, and on October 2, 1990 Defendant's Petition for Certification was granted, limited to the issue of whether the act of wrongdoing alleged by the State in the indictment constituted a violation of N.J.S.A. 2C:30-2a. The New Jersey Supreme Court in a four to two Written Opinion with Dissent confirmed the conviction (Appendix A).

Petitioner filed a Motion for Reconsideration which was denied on September 4, 1991. See Order denying Petitioner's Motion for Reconsideration, attached as Appendix C to this Petition. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. Sec. 1257 (3) (1982), as well as the United States Supreme Court's supervisory function.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. Amend. V: No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb, nor be deprived of life, liberty, or property, without due process of law.

U.S. Const. Amend. VI: In all criminal prosecution, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and District wherein the crime shall have been committed . . . to be informed of the nature and cause of the accusation

U.S. Const. Amend. XIV: No state shall . . . deprive any person of life, liberty, or property, without due process of law

N.J.S.A. 2C:30-2 Official Misconduct: A public servant is guilty of official misconduct when, with purpose to obtain a benefit for himself or another or to injure or to deprive another of a benefit:

a. He commits an act relating to his office but constituting an unauthorized exercise of his official functions, knowing that such act is unauthorized or he is committing such act in an unauthorized manner; or

b. He knowingly refrains from performing a duty which is imposed upon him by law or is clearly inherent in the nature of his office.

Official misconduct is a crime of the second degree. If the benefit obtained or sought to be obtained, or of which another is deprived or sought to be deprived, is of a value of $200.00 or less, the offense of official misconduct is a crime of the third degree.

New Jersey Court Rules R.1:8-9 ". . . Verdict shall be unanimous in all criminal actions."

STATEMENT OF THE CASE

On February 19, 1986, two school administrators entered and searched Ruth Parker's classroom at the Robert Fulton School in North Bergen. Parker taught a class of perceptually impaired children ranging from ten to twelve years old. The administrators' search was prompted by a parental complaint that they had received concerning Parker. In the course of their search, the administrators discovered a bottle of rum and an envelope containing sexually explicit magazines in Parker's classroom closet. In response, Ruth Parker was suspended from teaching. Thereafter, the administrators conducted interviews with the students in her class.

In those interviews, and before the Grand Jury, various students testified that Ruth Parker had touched them or others in their "private parts:' In addition, several of the young witnesses testified that Parker had shown them sexually explicit magazines. Other students said that she would have students cut out the private parts of people in the magazines and make collages out of them. One student stated that Parker had brought the bottle of rum into the classroom and that students had tasted it while she was out of the room. Other students testified that Parker discussed the sexual proclivities of herself and other faculty members.

A Grand Jury indicted Ruth Parker, charging her with eleven counts of criminal conduct. She was charged with one count of official misconduct, in that she engaged "in a continuing course of conduct which sexually abused, humiliated and otherwise endangered the welfare of children while (she) had a legal duty to care for the children and had assumed responsibility for their care", and four counts of sexual assault through committing acts of sexual contact on individual students, one count of attempted sexual assault on another student, five counts of endangering the welfare of children.

At trial, some students admitted that they had fabricated parts of the stories. One admitted that he had brought the bottle of rum into the classroom. Others testified that a student had brought in the magazines; others said that Defendant had found the magazines on the floor. Some admitted testifying falsely before the Grand Jury about having witnessed sexual contact or otherwise having told the Grand Jury untrue stories. All in all, when the witnesses were subjected to cross examination in the courtroom, they wavered in many specifics.

The jury convicted Defendant of official misconduct but acquitted her of three counts of sexual assault. On the remaining counts, the jury was unable to reach a verdict. The fourth count of sexual assault having been dismissed prior to trial.

The Appellate Division affirmed the conviction in spite of the fact that the majority noted, the State's case was "replete with recantation, contradictions, inconsistencies and confusion". One member of the Appellate panel dissented, finding that the trial court's failure to give the jury specific instructions that they all had to agree on the particular act that constituted official misconduct violated Defendant's right to a unanimous jury verdict. Defendant appealed to the N.J. Supreme Court as of right, R. 2:2-1 (a), and was also granted a Petition for Certification on the issue of whether the acts of wrongdoing alleged by the State in Defendant's indictment constituted official misconduct under N.J.S.A. 2C:30-2a to New Jersey Supreme Court. Therefore,that Court addressed the issue of misconduct as a crime,inspite of the State's failure to prove any allegation of sexual assault and/or endangering the welfare of children.

New Jersey Supreme Court on July 17, 1991 in a split decision of four to two affirmed the conviction (See Appendix A). A Motion for Reconsideration was filed and an Order denying same was entered on September 4, 1991 (See Appendix C). On September 17, 1991, Application for Bail was denied by the Honorable Justice David H. Souter (See Appendix D). On September 18, 1991 Defendant was remitted to the custody of New Jersey Commissioner of Corrections for custodial sentence of five years.

HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW

The federal issues that Petitioner raises in this Petition concern fundamental constitutional rights under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution. All of these issues were presented to the New Jersey Supreme Court by the Dissent of the Honorable Richard S. Cohen of Appellate Division of the State of New Jersey and in Petitioner's Briefs challenging her conviction. In a written opinion; the New Jersey Supreme Court majority rejected those federal constitutional claims and affirmed the conviction. The Dissent recognized the unconstitutional nature of the conviction (See Appendix A).

REASONS FOR GRANTING WRIT

I.

NO ERROR IS HARMLESS WHEN IT VIOLATES THE UNITED STATES CONSTITUTION.

The State in summing up their Brief to the New Jersey Supreme Court makes the following statement, "finally, even if this Court disagrees that the alternative action set forth in Count I are conceptually distinct and that a specific unanimity instruction should have been given the jury, nevertheless, any error was harmless". cannot believe the arrogance of the State with such a statement. The denial of justice or it's administration is never harmless. It not only harms the individuals who are involved as a result of these errors, but it harms the very institutions and principles which our courts and our Constitution stands for. There is nothing more important to me as an American than my belief that we are a country of law. I will admit that we are human and errors will occur; however, to call them harmless does not sit with me well on an evening such as this. [January 24,1991-America at War] The more I review the papers in this matter, the more I feel that it's all a terrible game. Nowhere do we appear to be looking for truth or justice, but our legal system has come down to a plug in a precedent situation to justify a position taken. The issues of fair play and equity appear to be lost in this case. I even find

myself at times falling into the trap of relating to my client, Ruth Parker, as Defendant. But Ruth Parker is an individual who our forefathers, when they framed the Constitution, looked to protect. Have we all forgotten this? Has the very simple issue of the State proving guilty beyond a reasonable doubt been lost for now? Having failed to prove any specific act against Ruth Parker they fall back on a general claim of misconduct which, when charged to the jury, does not even relate to or track with the original indictment. It appears clear to me that the course of conduct alleged, solely related to sexual issues, endanger of welfare includes the humiliation which the State now tries to separate out as it looks for some issue to justify its conviction.

The Trial Judge in his charge to the jury, allows the jurors to apply their own common sense when he says "There is nothing that I can tell you in a charge that would enable you to come to a decision any more other than using your own common sense, in the light of your own experiences, in the number of years each of you had lived up until today"

In light of that statement, I would take the same liberty in applying my own common sense and experience to this entire case. As we are all aware, in the mid 1980s sexual harrassment in schools and molestation of children became an everyday affair on television news, and it would be naive of us to think that these issues had not permeated the school system. Like anyone else, I look at this case and at first blush was repulsed by the allegations and their import, particularly then my first exposure to this matter was reading the Appellate decision, which I have stated earlier, appears to be a cart before the horse situation. This was reinforced when I finished reading Judge Cohen's Dissent.

Judge Cohen's Dissent pointed up to me, as well as reminded me, the reasons that I first wanted to be a lawyer which was my love for this country and the principles it stands for. Unfortunately, like so many people, practicing law and other wise we tend to forget the responsibility which is the price of the freedoms we enjoy. At times, such as now, these issues are brought into focus, the importance of individuals and their interactions with

their governments and their laws. The guilt of an individual being proved beyond a reasonable doubt, can only stand in common sense with a unanimous verdict. It is a principle so basic to our way of life, because each individual has value. To discount one's opinion, which is what is done when there is not unanimity in the verdict, is to negate the principle of beyond a reasonable doubt because each individual is important.

Ruth Parker is an individual and is important. She has weathered the storm of accusations—sexual assault, attempted sexual assault, endangering the welfare of children only to be crucified on the cross of official misconduct. However, this cross has been cut from a tree which is rooted in doubt. There is no doubt that this case is replete with recantations, contradictions and inconsistencies and confusion. (A-16, B-28) This seems to be the one point the Majority and Dissent at the Appellant Division as well as the N.J. Supreme Court agree upon. But no one in this case has been able to agree upon the truth. No where does the jury, the Appellate Division or N.J. Supreme Court come out and say that Ruth Parker is guilty of misconduct because of X. Even Judge Cohen, in his Dissent, uses phrases such as "For all we know" (B-40), "the jury may well have"(B-[illegible]) and other phrases which indicate we do not know what this jury did. The only issue in this case which has been proved beyond a reasonable doubt is that Ruth Parker was a teacher. I must emphasize that as a result of these hideous charges not being proved beyond a reasonable doubt, the jury found her guilty of misconduct and, as even the Petition for Certification (F-51) recognizes, there is even an issue of whether or not the act of wrongdoing constitutes a violation. Again, we are back to the word the "act". What is the act? The only act that has been proven is she was a teacher and, in my humble opinion, a victim.

II.

DEFENDANT'S CONVICTION OF OFFICIAL MISCONDUCT VIOLATES HER CONSTITUTIONAL RIGHT TO A UNANIMOUS JURY VERDICT.

The Court will note that this is the lead sentence from the Honorable R. S. Cohen Dissent filed at the New Jersey Appellate Division in this matter. Judge Cohen's Dissent clearly sets forth the position of Defendant and the true road to justice.

R. 1:8-9 RETURN OF VERDICT

> In every trial by jury the verdict shall be returned by the jury to the judge in open court. The verdict shall be unanimous in all criminal actions and shall be rendered by at least five-sixths in civil actions.

Because the rule requiring an unanimous verdict of guilt in criminal trials is "fundamental", doubt about the jury's consensus strikes at the heart of a Defendant's right to a fair trial. See State v. Reynolds, 41 N.J. 163, 187 (1963), cert. denied, 377 U.S. 1000, 84 S. Ct. 1930, 12 L.ED.2d 1050 (1964); State v. Cordasco, 2 N.J. 189, 202 (1949); R. 1:8-9. The trial court must give a specific unanimity instruction when confronted with the danger of a fragmented verdict. (A-15). The application of that rule to this case would reverse Defendant's conviction for official misconduct.

The Trial Court instructed the jury on the need for a unanimous verdict; it never explained that the jury must unanimously agree on the conduct constituting the requisite "unauthorized act". The charge indicated that to convict Parker of official misconduct, the jury need only agree unanimously that Parker had committed some undefined "unauthorized act".

The peculiar circumstances of this case were "the perfect setting for a patchwork verdict". The Dissent at both the Appellate Court and Supreme Court of New Jersey found that the failure to give a specific "unanimity" instruction violated Parker's right to a unanimous jury and would have reversed Parker's conviction.

In the New Jersey Supreme Court neither the Majority nor Dissent could identify the act or acts that the jury unanimously found Parker had committed. In short, the jury may have in fact convicted Parker without agreeing unanimously on what wrong she had committed. Various considerations suggest that result, including the disposition of the other count.

To convict Parker of official misconduct, the jury need have agreed only that she had committed "unauthorized acts" in her teaching position. Such an analysis renders meaningless the rule requiring unanimity on the underlying act. Essentially, it authorizes a jury to convict when it has only a generalized suspicion that the Defendant did something bad but cannot agree what the Defendant did, and allows each juror to express his or her doubts about Defendant's general behavior.

In this vein, the United States Supreme Court recently acknowledged the notion that "no person may be punished criminally save upon proof of some specific illegal conduct" is "so rooted in the traditions and conscience of our people as to be ranked as fundamental". Schad v. Arizona, 59 U.S.L.W. 4762 at 4764. Justice Souter acknowledged that due process would not permit a crime "so generic that any combination of jury findings of embezzlement, murder, tax evasion or littering would suffice for conviction". Id. at 4764. On the facts of that case, however, he concluded that states could reasonably define felony and premeditated murder as alternative means of committing the single crime of murder. See ibid. In this case not even the New Jersey Supreme Court could identify the "unauthorized act" and, if compared to Schad v. Arizona, had no cause of death. See Appendix G-52.

The offense of official misconduct is so vague that it conjures up Justice Souter's generic crime. Ibid. The problem here, however, is not merely the vagueness of the statute, indictment, and jury charge, but also the contradictory nature of the State's proofs. That combination engendered the genuine possibility that the jury did not agree what "specific illegal conduct," id. at 4764, Parker had committed. The effect was to deprive Parker of her fundamental right to a conviction based on proof of specific illegal acts. See Schad,supra, 59 U.S.L.W. at 4764.

The indictment vaguely alleged that Parker had engaged in a continuing course of conduct that sexually abused, humiliated and endangered the welfare of her students. The differing verdicts on the several counts suggest that the jury thought that it could choose among the alleged acts. After acquitting Defendant of sexual abuse and disagreeing on the other charges, the jury could have concluded that "humiliating" students constituted official misconduct, when Count I of the indictment appears clearly to state that the humiliation is part of the endangering by the conjunction and otherwise endangered the welfare of children. Therefore, the jury could convict Parker of official misconduct if it unanimously found that she had "humiliated" her students in some undefined, undescribed way, yet not endangered their welfare.

The jury may have gravitated toward the generic crime of official misconduct, which enabled them to convict her without agreeing on the basis of that conviction and denied Parker her right to a unanimous jury verdict.

In Petitioner's case, juror unanimity encompasses more than mere agreement on a verdict offering several means towards an end. Jurors must be in agreement as to the specific acts that a Defendant committed to return a unanimous verdict.

Federal courts have long held that the jury must reach unanimity on the facts in issue, to convict a Defendant. The First Federal Court of Appeals to consider this issue was United States v. Gipson, 553 F.2d 453 (5th Cir. 1977). Using this Court's opinion in In re Winship, 397 U.S. 358 (1970) for guidance, the court in Gipson reasoned that "(t)he unanimous jury requirement impresses on the trier of fact the necessity of reaching a subjective state of certitude on the facts in issue.'" Gipson, 553 F.2d at 457 quoting In re Winship, 397 U.S. at 364. The court went on to say that "(r)equiring the vote of twelve jurors to convict a Defendant does little to insure that his right to a unanimous verdict is protected unless this prerequisite of jury consensus as to the Defendant's course of action is also required." Gipson, 553 F.2d at 458.

Other courts, both Federal and State, have found the reasoning of Gipson persuasive. See e.g. United States v. Beros, 833 F.2d 455 (3rd Cir. 1987) "(persuaded by the analysis and rationale" of Gipson; the court held that"(w)hen the government chooses to prosecute under an indictment advancing multiple theories, it must prove beyond a reasonable doubt at least one of the theories to the satisfaction of the entire jury."); United States v. Payseno, 782 F.2d 832 (9th Cir. 1986) (general unanimity instruction is not sufficient when different theories of guilt are presented to jury, citing Gipson) Probst v. State, 547 A.2d 114 (Del. 1988) (holding "(t)he Sixth Amendment to the United States Constitution requires that there be a conviction by a jury that is unanimous as to the Defendant's specific illegal action," citing Beros, supra).

Requiring juror unanimity on a single act is necessary to effectuate the reasonable doubt standard enunciated by this Court in In re Winship,supra. Without juror agreement as to what specific acts a Defendant performed, the reasonable doubt standard is emasculated.

This Court has held that although the Sixth Amendment requires a unanimous verdict in federal criminal trials, it does not in state criminal trials. Johnson v. Louisiana, 406 U.S. 356 (1972) and Spodaca V. Oregon, 406 U.S. 404 (1972). As recognized in the within case, the State of New Jersey has chosen to make jury unanimity a state constitutional right. State v. Parker, 124 N.J. 628 at 633) Then it must administer that right consistent with due process of law. Evitts v. Lucey, 469 U.S. 387 (1985) (when a state provides a right, it must administer that right in accord with due process). New Jersey has failed to do so here.

III.

JUSTICE—"BLOWING IN THE WIND"

A review of the New Jersey Supreme Court Majority and Dissenting Opinion (Appendix A) in this matter clearly indicate certain telltales pointing to the fact that this matter should be overturned. In sailing, a telltale is a device by which people can tell which way the wind is blowing because no one can see the wind but only observe its effects. This appears to be a fitting analogy to the New Jersey Supreme Court Majority Opinion. The first telltale sign appears at the end of the Introductory Section, 124 N.J. 628 at 631, when the Majority states "We also believe that her actions could constitute official misconduct". This single word shows the uncertainty of the Majority of what the jury did do or did not do in reaching its verdict. This same uncertainty is echoed at the end of Point #4, 124 N.J. 628 at 691, when the Majority again writes "All of those acts were unauthorized and were performed in the course of the exercise of her official function as teacher, presumably as the jury could have found, to satisfy her own interests. If believed by the jury, Defendants course of conduct would undoubtedly constitute official misconduct." (Emphasis Added)

With all due respect to the New Jersey Supreme Court Majority I believe that Court has fallen into the trap of our modern practice of law which totally ignores the principles under which criminal justice under the United States Constitution is based. In point of fact, we always talk in criminal justice as guilty beyond a reasonable doubt and being innocent until proven guilty. The presumption of innocence must be overcome by inductive reasoning; however, it appears that as in many cases deductive reasoning has led to the decision at hand. I would feel more comfortable and sure if the New Jersey Supreme Court had found that her actions did constitute official misconduct as well as the fact that they knew; had found a way and did believe the course of conduct would undoubtedly constitute misconduct.

Of course I agree with the Dissent in its reasoning which is stated and reasoned far in excess of my capabilities. I note that both the Majority and Dissent refer to Schad v. Arizona, 59 U.S.L.W. 4762, and each draws different conclusions. The New Jersey Supreme Court Dissent has properly applied Schad to the facts in this case. I believe this because it appears to me that in the Schad case it is clear that acts occurred and the question raised is how it would be defined, whether being premeditated or felony murder. In the case at bar, the New Jersey Supreme Court as stated earlier, cannot even say what was done, or point to a specific act that a jury did agree on.

Another telltale sign in the New Jersey Supreme Court Majority Opinion, which I believe the Dissent picks up on clearly, is reflected at 124 N.J. 628 at 639, in the New Jersey Supreme Court Majority Opinion when the Court write "Furthermore, the jury never exhibited any signs of confusion. Early in its deliberations the jury asked to be recharged on the official misconduct charge and on the endangerment charge and asked for copies of the statutes associated with both charges. In so doing, the jury did not indicate that it was confused concerning its responsibility to reach a unanimous verdict."

Possibly, as the Dissent seems to point up, the jury did not indicate confusion concerning its responsibility to reach unanimous verdict because they did not realize they had to as to Count I. It would seem common sensible you cannot be confused about something you are unaware of. I believe the Dissent picks this up clearly when it states at , 124 N.J. 628 at 649, "In the present case, the offense of official misconduct is so vague that it conjures up Justice Souter s generic crime".

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This again reinforces the conflict of inductive and deductive reasoning to wit it appears that the questions for the jury would be: Defendant, Ruth Parker, committed official misconduct by _____ act. If you look at the totality of the indictment, being that the first count talks in terms of sexual abuse, humiliation and otherwise endanger the welfare of children, we see that the jury could not unanimously agree on any act of sexual abuse or endangering the welfare of children. It becomes important to note that the humiliated is joined with otherwise endangering the welfare of children. I have taken issue throughout this case with the catchall humiliation which the Majority seems to adopt from the Attorney General's position, 124 N.J. 628 at 639. The perception that humiliating could be a separate act is clearly not true but is part of the endangering.

At oral argument and is recited in the New Jersey Supreme Court Majority Opinion concerning the most basic of issues to the misconduct statutes that being stated on 124 N.J. 628 at 640, when the New Jersey Supreme Court writes "Defendant argues that because she was not convicted of the other criminal acts alleged in the indictment, she could not be found guilty of official misconduct. Defendant argues that the acts she performed (for example, exhibiting the sexually-explicit magazines) cannot provide a basis for official misconduct because those acts were not found to be criminal. We disagree." However, when they go through the cases to support this proposition, we find that the acts alleged in State v. Stevens, 203 N.J. Super. 59, of sexual assault which in itself is a crime. State v. Gleitsmann, 62 N.J. Super 15, we have theft of services or theft of public monies by the use of the telephone, which is a crime, and in State v. Scirrotto, 115 N.J. 38, we again have sexual assault. Clearly each one of those underlying acts would be a crime and a review of those cases indicates also that it was found that the factual basis existed for those crimes prior to finding of guilty for misconduct. As the Dissenting Opinion clearly points out, we are not sure which acts finally were agreed to as misconduct for Defendant, Parker. If it is the writing one-hundred times and/or being placed in the box, has criminal statutes been violated?

A review of the transcripts indicate a cart before the horse approach by the jury and, in point of fact, shows that the endangering counts which were hung never came into play with the conviction of misconduct. I draw the Courts attention to that portion of the transcript, December 18, 1986, Page 62, at Lines 11 thru 15, where the Court advises that at that time the first four counts had been settled. It is noted that, of course, these are the misconduct and sexual assault counts. Therefore, it appears that misconduct was already, decided in spite of the fact that the sexual assault counts had been found not guilty and endangering counts not decided upon. Another point in that transcript, Page 34, seems to negate the non-confusion the Majority relies on when at Line 17 the Court notes that it is the fourth request for definition as to endangerment.

> "The greatest of all injustice is that which goes under the name of law; and of all sorts of tyranny, the forcing the letter of the law against the equity is the most insupportable."
>
> L'Estrange

Another point which the Majority seems to find key is the lack of adequate counsel in this matter. The Court raises issues of waiver by the trial attorney as well as the failure of the attorneys handling the appeal to raise issues which were cited by Judge Cohen. Further, my own representation has been to the best of my ability but, as the New Jersey Supreme Court is well aware, same is limited. I believe that the Dissenting Opinion sees through a veil of deception and confusion that the indictment raised which is unseen by the trial attorney and recognized by Judge Cohen and hits at the major underpinnings that a person can be convicted upon a suspicion and not solid facts of an act beyond a reasonable doubt.

It appears that the New Jersey Supreme Court will allow injustice to stand even when it clearly sees it, because Petitioner's trial attorney made a human error. "Let he who is perfect, cast the first stone."

IV.

THE INDICTMENT CHARGING DEFENDANT, RUTH PARKER, WITH OFFICIAL MISCONDUCT IS FATALLY DEFECTIVE IN THAT IT FAILS TO ALLEGE WITH SPECIFICITY ANY FACTS SUPPORTING THE CONCLUSION.

Article I, Paragraph 8, of the New Jersey Constitution of 1947 guarantees each criminal defendant a right to an indictment by Grand Jury prior to being placed on trial for the commission of an offense. It provides "no person shall be held to answer for a criminal offense unless on the presentment or indictment of Grand Jury . . ."

Both the United States and New Jersey Constitutions provide that "in all criminal prosecutions the accused shall have the right to be informed of the nature and cause of the accusation." New Jersey Constitution (1947) Article I, Paragraph 10; Amendment VI, United States Constitution.

This right is deemed basic to our system of criminal justice; it is part of the due process of law guaranteed by the Fourteenth Amendment to criminal defendants in the criminal courts of the States. Faretta v. California, 422 U.S. 806, 819 (1975).

These Constitutional protections provide the basis for judicially imposed standards used in determining the sufficiency of an indictment. First, the indictment must inform the Defendant of the offense charged against her so that she can adequately prepare a defense. Second, it must be sufficiently specific to enable the Defendant to avoid a subsequent prosecution for the same offense and must be sufficiently specific so as to preclude substitution by a jury of an offense which the Grand Jury did not consider or charge. State v. LeFurge, 101 N.J. 404, 415 (1986).

The inquiry in this case should be whether the indictment misleads or misinforms the Defendant as to the criminal conduct charged. State v. Wein, 80 N.J. 491, 497 (1979). Without question, in this case, Defendant was misled. See the first count of the indictment charge (Appendix E-51-52).

The Defendant reasonably and properly believed that the same facts giving rise to counts II through XI would be employed to support the allegation of official misconduct. (See Appendix E, E-46 thru E-50) No other factual basis was given. (By way of contrast, note the specificity with which the count alleging misconduct was drafted in State v. Furey, 128 N.J. Super 12, 18-19 (App. Div. 1974).)

That the Defendant was prejudiced by the deficiency of the indictment is beyond question. She was not convicted of any of the other counts. The Trial Judge in his charge to the jury on official misconduct provided no guidance as to how the jury was to decide this issue, he gave no examples or illustrations of what actions would constitute the offense as a matter of law. He simply read to the jury the law.

The trial court's failure to properly charge resulted from the assumption that the jury would find official misconduct as a result of finding a sexual assault or endangerment.

The deficiency of the indictment resulted in a finding of guilty by the jury as to Count I without any factual basis for that finding. It is impossible even to ascertain what "facts" the jury relied on in their finding, as noted earlier herein.

Due process requires that the specific facts alleged in the indictment be proven beyond a reasonable doubt. Clear failure in this case to give notice of those facts and the resulting inability to posit what acts alleged were in fact proven to be committed by Defendant mandates a reversal of Defendant's conviction under the Sixth Amendment of the United States Constitution.

V.

WHAT IS THE BASIS FOR MISCONDUCT IN OFFICE IN THE CASE AT BAR?

Each and every one of the counts of the indictment is charged with an emotional dynamite of sexual accusations.

This Honorable Court is not unaware of the explosive emotional charge involved in any accusation concerning sexual conduct. The best of men and women can be brought down by accusations and never fully recover their good reputation after same has been made. In the case at Bar, this is truth that cannot go unnoticed. Fundamental fairness dictates that with the other counts having been acquitted or hung, the first count must also fall.

The reason of the case is totally involved with sexual accusations against Petitioner. Joining the misconduct count is repugnant to fundamental fairness and set the stage for a grave miscarriage of justice. Whenever sexual counts are raised, it appears that parties involved are guilty until proven innocent, and this analysis seems ultimately true in this case where as the actual acts of sexual conduct which were embodied in the assault and endangering counts, did not reach finding of guilty but only contributed to the unjust result as to the misconduct.

The State will have its pound of flesh from the Petitioner in spite of the fact that its own Supreme Court cannot say with any certainty what act was committed to be guilty of misconduct in office with the exception of the fact that she was accused. It seems ultimately ironic that the Majority of the New Jersey Supreme Court can have the arrogance to say:

> "Although such a charge (specific unanimity instruction) should be granted on request, in the absence of a specific request, the failure so to charge does not necessarily constitute reversible error." 124 N.J. 628 at 637.

when the function of the Court is to pursue justice. In this case justice is not blind but has chosen to look the other way. The Dissent is but "a cry in the wilderness".

> Because defense counsel did not object to the charge, the matter arises as one of plain error. The test is whether the error "possessed a clear capacity to bring about an unjust result." State v. Hock, 54 N.J. 526, 538, 257 A.2d 699, cert. denied, 399 U.S. 930, 90 S.Ct. 2254, 26 L.Ed.2d 797 (1970). Here, the described error had that capacity. The charge directed the jury that to convict Parker of official misconduct, it need not unamimously agree on the act that she had committed. The indictment, the testimony, the jury charge, and the elements of the crime reinforced the error that the jury could convict Parker of official misconduct simply if it believed that she had done some undefined bad acts. Apparently, the despicable nature of the charged conduct impelled the jury towards conviction, but the State's case was so weak that the jury could not convict defendant of a specfic substantive crime. Following the court's charge, however, the jury may have gravitated toward the generic crime of official misconduct, which enabled them to convict her without agreeing on the basis of that conviction. Under these circumstances, I am constrained to find that Parker was denied her right ot a unanimous jury verdict. 124 N.J. 628 at 650. **(A23)**

CONCLUSION

To prevent the misapplication of Schad v. Arizona, and to ensure constitutional rights of the citizens of the State of New Jersey, This Court should grant this Petition for writ of certiorari and reverse the judgment of the New Jersey Supreme Court, and exercise the supervisory function over the State courts.

Respectfully Submitted,

DEAN LYNCH, Attorney
for Petitioner

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SUPREME COURT OF NEW JERSEY, 1991.
592 A.2d 228

STATE OF NEW JERSEY, PLAINTIFF-RESPONDENT, v. RUTH PARKER, DEFENDANT-APPELLANT.

Cite as, 124 N.J. 628

Argued February 26, 1991—Decided July 17, 1991.

SYNOPSIS

Teacher was convicted in the Superior Court, Law Division, of official misconduct, and she appealed. The Superior Court, Appellate Division, affirmed with one member of the panel dissenting. Teacher appealed as of right. The Supreme Court, O'Hern, J., held that: (1) ordinarily, a general instruction on the requirement of unanimity suffices to instruct the jury that it must be unanimous on whatever specifications it finds to be the predicate of a guilty verdict, but a specific instruction should be given on request if there is a possibility of a fragmented verdict or of juror confusion; (2) the general instruction on unanimity was sufficient where the charge of official misconduct was based on acts that formed core of a teacher-student relationship and where the jury did not demonstrate confusion; and (3) the teacher could be convicted of official misconduct for exhibiting sexually explicit magazines to her students, having the students make collages from photographs cut out of those magazines, and discussing with students her sexual proclivities and those of others, even if the teacher was not convicted of the underlying offenses of sexual assault and child endangerment.

Judgment of Appellate Division affirmed.

Pollock, J., dissented with opinion in which Clifford, J., joined.

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1. Criminal Law ⇐798

Defendant has constitutional right to unanimous jury verdict in criminal prosecution. N.J.S.A. Const. Art. 1, par. 9; U.S.C.A. Const.Amend. 6; R. 1:8–9.

2. Criminal Law ⇐798

Ordinarily, general instruction on requirement of unanimity suffices to instruct jury that it must be unanimous on whatever specifications it finds to be predicate of guilty verdict; however, specific unanimity instruction should be given if it appears that there is genuine possibility of juror confusion or that conviction could result from different jurors concluding that defendant committed conceptually distinct acts. N.J.S.A. Const. Art. 1, par. 9; U.S.C.A. Const.Amend. 6; R. 1:8–9.

3. Criminal Law ⇐798

In cases in which there is danger of fragmented verdict, trial court must, upon request, offer specific unanimity instruction. N.J.S.A. Const. Art. 1, par. 9; U.S.C.A. Const.Amend. 6; R. 1:8–9.

4. Criminal Law ⇐1173.2(1)

Although specific unanimity charge should be granted on request, failure to give unrequested charge is not necessarily reversible error. N.J.S.A. Const. Art. 1, par. 9; U.S.C.A. Const. Amend. 6; R. 1:8–9.

5. Criminal Law ⇐829(1)

Giving general unanimity instruction, without giving unrequested instruction that jury was required to agree unanimously that defendant engaged in specific conduct in violation of official misconduct statute, was not reversible error in prosecution of teacher for official misconduct for engaging in course of conduct that sexually abused, humiliated, and otherwise endangered children in her care; allegations addressed core of conceptually similar acts that arose out of teacher-student relationship, and jury did not demonstrate confusion. N.J.S.A. 2C:30–2, subd. a; N.J.S.A. Const. Art. 1, par. 9; U.S.C.A. Const.Amend. 6; R. 1:8–9.

6. Officers and Public Employees ⇐121

Charges of official misconduct may be sustained without proof of underlying criminal act. N.J.S.A. 2C:30–2, subd. a.

7. Officers and Public Employees ⇐121

To be guilty of official misconduct, official must have performed underlying act in order to obtain some benefit or to injure another; however, benefit need not be pecuniary and injury need not be physical. N.J.S.A. 2C:30–2, subd. a.

8. Schools ⇐147

Teacher could be convicted of official misconduct on basis of evidence that she exhibited sexually explicit magazines to her students, that she had children make collages from those magazines, and that she discussed with students her sexual proclivities and those of others, even if teacher was not convicted of underlying charges of sexual assault and child endangerment. N.J.S.A. 2C:30–2, subd. a.

Dean Lynch argued the cause for appellant.

Catherine A. Foddai, Deputy Attorney General, argued the cause for respondent (*Robert J. Del Tufo*, Attorney General of New Jersey; *Catherine A. Foddai* and *Chana Barron*, Deputy Attorney General, of counsel).

The opinion of the Court was delivered by

O'HERN, J.

Defendant contends that her conviction of official misconduct as a teacher should be reversed because the trial court's instructions did not ensure a unanimous jury verdict. She argues that because the indictment charged multiple instances of misconduct and the jury did not convict her of each of the specifically-charged acts of sexual assault and endangerment, the jurors may have reached a compromise verdict on the official-misconduct count, with some believing that she had committed certain of the acts charged and some believing that she had committed others of the acts charged, but none unanimously agreeing on the specific acts committed. Defendant also questions whether the actions attributed to her qualify as official misconduct.

We disagree with her contentions and affirm the conviction. We believe that the jury instructions adequately conveyed to the jury the requirement that it must unanimously agree beyond a reasonable doubt that defendant had engaged in specific conduct that violated the official-misconduct statute. We also believe that her actions could constitute official misconduct.

I

For the specifics of this case, we draw on the facts stated in defendant's brief to the Appellate Division.

On February 19, 1986, two school administrators entered and searched defendant's classroom at the Robert Fulton School in North Bergen. Defendant taught a class of perceptually-impaired children ranging in age from ten to twelve years. The administrators decided to search defendant's classroom in response to a parental complaint they had received about her. In the course of their search, the administrators discovered in defendant's closet a bottle of rum and an envelope containing sexually-explicit magazines. After the search and discovery, the administrators suspended defendant from teaching and conducted interviews with the students in her class.

Either in those interviews, before the grand jury, or at trial, various students testified that defendant had touched them or others in their "private parts." In addition, several of the young witnesses testified that defendant had shown them the sexually-explicit magazines that had been found in the classroom. They said that defendant would have them "draw on or cut out the private parts of people in the magazine, and sometimes make cutouts herself, to be pasted in a book." One student stated that defendant had brought the bottle of rum into the classroom and that students had tasted it while defendant was out. Various students testified that defendant had told them about her "wacky" friend who was a "lesbian"; another said that she had told them that she wanted to "sleep with" a school administrator. One student testified that defen-

dant had said that she wanted to marry and "do bad things" with the school administrator; another stated that defendant had said that she was "going out" with the administrator and wanted to marry two other male teachers; and yet another student could remember defendant saying only that she "liked" the administrat but added that defendant had told the class that "the gym cher was a lesbian" and that "the art teacher was taking drugs." Others described bizarre disciplinary methods that included "being put in a box" and writing words and phrases one hundred times.

A grand jury indicted defendant, charging her with eleven co s of criminal conduct. t charged her with four counts of se al assault through committing acts of sexual contact on in idual students, one count of attempted sexual assault on another student, five counts of endangering the welfare of children, and one count of official misconduct, contrary to the provisions of *N.J.S.A.* 2C:30–2a, in that she had engaged "in a continuing course of conduct which sexually abused, humiliated and otherwise endangered the welfare of children while [she] had a legal duty to care for the children and had assumed responsibility for their care."

At trial, some students admitted that they had fabricated parts of the stories. One admitted that he had brought the bottle of rum into the classroom. Others testified that a student had brought in the magazines; others said that defendant had found the magazines on the floor. Some admitted testifying falsely before the grand jury about having witnessed sexual contact or otherwise having told the grand jury untrue stories. All in all, when the witnesses were subjected to cross-examination in the courtroom, they wavered in many specifics.

The jury convicted defendant of official misconduct but acquitted her of three counts of sexual assault. On the remaining counts, the jury was unable to reach a verdict.

The Appellate Division affirmed the conviction, but one member of the panel dissented, finding that the trial court's failure

to give the jury specific instructions that they all had to agree on the particular act that constituted official misconduct violated defendant's right to a unanimous jury verdict. Defendant appealed to us as of right. *R.* 2:2–1(a). We also granted defendant's petition for certification on the issue of whether the acts of wrongdoing alleged by the State in defendant's indictment constituted official misconduct under *N.J.S.A.* 2C:30–2a. 122 *N.J.* 381, 585 *A.*2d 385 (1990).

II

[1, 2] Like the "reasonable doubt" standard that was found to be an indispensable element at all criminal trials in *In re Winship*, 397 *U.S.* 358, 364, 90 *S.Ct.* 1068, 1072, 25 *L.Ed.*2d 368, 375 (1970), "the unanimous jury requirement 'impresses on the trier of fact the necessity of reaching a subjective state of certitude on the facts in issue.'" *United States v. Gipson*, 553 *F.*2d 453, 457 (5th Cir.1977) (quoting *In re Winship, supra*, 397 *U.S.* at 364, 90 *S.Ct.* at 1072, 25 *L.Ed.*2d at 375). Our Constitution presupposes a requirement of a unanimous jury verdict in criminal cases. *N.J. Const.* art. I, para. 9. Our Rules require that the "verdict shall be unanimous in all criminal actions." *R.* 1:8–9. Although the requirement of unanimity is self-evident, the meaning of the expression "facts in issue" is not as clear. *See Schad v. Arizona*, — *U.S.* ——, ——, 111 *S.Ct.* 2491, ——, — *L.Ed.*2d ——, —— (1991) ("Plainly there is no general requirement that the jury reach agreement on the preliminary factual issues which underlie the verdict." (quoting *McKoy v. North Carolina*, 494 *U.S.* 433, 449, 110 *S.Ct.* 1227, 1237, 108 *L.Ed.*2d 369, 385 (1990) (Blackmun, J., concurring))). For example, the court in *United States v. Peterson*, 768 *F.*2d 64 (2d Cir.), *cert. denied*, 474 *U.S.* 923, 106 *S.Ct.* 257, 88 *L.Ed.*2d 264 (1985), found that a jury does not have to agree unanimously on whether an actor's criminal role is that of a principal or an accomplice. *See also United States v. Horton*, 921 *F.*2d 540, 546 (4th Cir.1990) ("The jury found Horton guilty of one crime—first degree murder. The fact that the jurors may have

taken different routes [viewing Horton as accomplice or as principal] to this conclusion provides no grounds to reverse."), *cert. denied*, — *U.S.* —, 111 *S.Ct.* 2860, — *L.Ed.*2d — (1991). State jurisdictions have reached the same conclusion: in a case involving possible accessory liability, the jury should be regarded as unanimous even if some jurors believe that the defendant was an aider or an abettor, while other jurors believe that the defendant was a principal. *See, e.g., State v. Smith*, 212 *Conn.* 593, 563 *A.*2d 671 (1989). In those cases each juror has found the defendant guilty of the substantive crime whether it be as a principal or as an accessory. Although all jurors may not find the same facts, the facts that they find are not "conceptually distinct." *See State v. Johnson*, 46 *Ohio St.*3d 96, 105, 545 *N.E.*2d 636, 645 (1989) (where "the alternatives presented to the jury and charged in the specifications were not conceptually distinct * * * a 'patchwork' or less than unanimous verdict was not possible"), *cert. denied*, — *U.S.* —, 110 *S.Ct.* 1504, 108 *L.Ed.*2d 639 (1990).

Another example of non-unanimity on facts arises in cases involving continuing courses of criminal conduct. In the case of sexual misconduct, young children are often unable to testify with respect to any specific date on which sexual contact had occurred. Rather, they will describe such events as having occurred over a period of time. Yet, as the court held in *State v. Altgilbers*, 109 *N.M.* 453, 786 *P.*2d 680 (Ct.App.1989), if the evidence could convince a reasonable person beyond a reasonable doubt that the defendant committed the charged offense during the span of time, "[n]o juror need have a precise day in his or her own mind in order to vote for conviction." *Id.* at 471, 786 *P.*2d at 698; *see also* Note, *Right to Jury Unanimity on Material Fact Issues: United States v. Gipson*, 91 *Harv.L.Rev.* 499, 502 (1977) ("only common sense and intuition can define the specificity with which the jury must describe the defendant's conduct before it may convict").

Some jurisdictions are of the view that unanimity is not required when a statute states a single offense but provides for

various modes of commission of the offense. For example, Maryland's consolidated theft statute, which groups the various aspects of stealing goods and of receiving stolen goods into a single offense, does not require jury unanimity on which specific aspect of the offense occurred. *Rice v. State*, 311 *Md.* 116, 532 *A.*2d 1357 (1987); *see also United States v. MMR Corp. (LA)*, 907 *F.*2d 489 (5th Cir.1990) (because indictment charged defendants with joining conspiracy involving only one bid-rigging agreement, government did not have to prove precise obligations of each conspirator under the agreement, *e.g.*, high bid or no bid, but only that defendants did agree to join in the conspiracy; thus, general unanimity instruction was sufficient), *cert. denied*, — *U.S.* —, 111 *S.Ct.* 1388, 113 *L.Ed.*2d 445 (1991); *United States v. UCO Oil Co.*, 546 *F.*2d 833 (9th Cir.1976) (jury unanimity on specifics not required in conviction for making false statements and concealing material fact by trick, scheme, or device in relation to gasoline service-station business), *cert. denied*, 430 *U.S.* 966, 97 *S.Ct.* 1646, 52 *L.Ed.*2d 357 (1977). *See generally* Annotation, *Requirement of Jury Unanimity as to Mode of Committing Crime under Statute Setting Forth the Various Modes by which Offense May Be Committed*, 75 *A.L.R.*4th 91 (1990).

In some circumstances, however, a general charge on jury unanimity will not suffice. That is so when, for example, "a single crime can be proven by different theories based on different acts and at least two of these theories rely on different evidence, and [when] the circumstances demonstrate a reasonable possibility that a juror will find one theory proven and the other not proven but that all of the jurors will not agree on the same theory." *People v. Melendez*, 224 *Cal. App.*3d 1420, 1433–34, 274 *Cal.Rptr.* 599, 608 (1990). The leading case for that proposition is *United States v. Gipson*, *supra*, 553 *F.*2d 453. There, the government presented a case of improper disposal of automobiles based on what the appeals court viewed as "two distinct conceptual groupings," the housing and the marketing of stolen vehicles. *Id.* at 458. Reason-

ing that some jurors might have concluded that Gipson had committed acts in the first grouping while others concluded that he had committed acts in the second grouping, the court held that the possibility of "significant disagreement among the jurors as to what he did" barred his conviction. *Id.* at 458–59; *see also United States v. Payseno*, 782 *F.*2d 832, 836 (9th Cir.1986) ("'[When] there is *a genuine possibility of jury confusion* or that a conviction may occur as the result of different jurors concluding that the defendant committed different acts, the general unanimity instruction does not suffice.'" (quoting *United States v. Echeverry*, 719 *F.*2d 974, 975 (9th Cir.1983))). Obviously, use of the expression "distinct conceptual groupings" is more of a conclusion than a predicate to decision. *Schad v. Arizona*, *supra*, — *U.S.* at ——, 111 *S.Ct.* at ——, — *L.Ed.*2d at ——. In *Gipson*, as in many such cases, there was a tangible indication of jury confusion: the jury requested additional instructions on the issue, but the trial court instructed the jury that it need not be unanimous on the basis for guilt. Thus, the circumstances in which a general charge on jury unanimity will not suffice may include

> where the facts are exceptionally complex, *see Payseno*, 782 *F.*2d at 836–37, or where the allegations in a single count are either contradictory or only marginally related to one another, *id.*, or where there is a variance between the indictment and the proof at trial, *United States v. Echeverry*, 698 *F.*2d 375, 377, *modified*, 719 *F.*2d 974 (9th Cir.1983), *United States v. Mastelotto*, 717 *F.*2d 1238, 1250 (9th Cir.1983), or where there is a tangible indication of jury confusion. *Echeverry*, 698 *F.*2d at 376–77. In these instances, the trial court must give an augmented unanimity instruction. [*United States v. Ryan*, 828 *F.*2d 1010, 1020 (3d Cir.1987).]

The celebrated case of Oliver North highlights this issue. *United States v. North*, 910 *F.*2d 843 (D.C.Cir.) (*North I*), *vacated in part and rev'd in part on rehearing*, 920 *F.*2d 940 (D.C.Cir.1990) (*North II*), *cert. denied*, — *U.S.* ——, 111 *S.Ct.* 2235, 114 *L.Ed.*2d 477 (1991), and *cert. denied*, — *U.S.* ——, 111 *S.Ct.* 2235, 114 *L.Ed.*2d 477 (1991). North had requested specific unanimity instructions from the trial court and had objected to the trial court's refusal to give such instructions. On appeal, North claimed that the circumstances of the case

indicated a high possibility of a "patchwork verdict" in that the case against him embraced in one count a broad-based charge of destroying, altering, or removing official documents from mid- to late November 1986. Because each of the charged document groupings was conceptually distinct (*e.g.*, a ledger of the Contra operating fund, documents concerning Iranian arms sales, documents removed but returned to his National Security Council office), and North's culpable mental state concerning each was in issue (did he know that it was a crime to remove or alter or shred each of the documents?), the circuit court initially concluded that North's request for a specific unanimity charge should have been granted and that the failure to give the charge constituted reversible error. Following the Independent Counsel's petition for rehearing, the circuit court noted that the trial court had limited the jury's consideration to "a single incident involving five specific documents." *North II, supra*, 920 *F.*2d at 951. In reviewing once again the jury instructions, the court found that the instructions "as a whole did not pose 'a genuine risk that the jury [would be] confused' " and concluded that the omission of a specific unanimity instruction did not constitute reversible error. *Ibid.* (quoting *United States v. Duncan*, 850 *F.*2d 1104, 1114 (6th Cir.1988), *cert. denied*, —— *U.S.* ——, 110 *S.Ct.* 732, 107 *L.Ed.*2d 751 (1990)).

[3] Concerning the need for a specific unanimity instruction, we agree with the proposition stated in *North I* that is generally applied in the federal system: "in cases where there is a danger of a fragmented verdict the trial court must upon request offer a specific unanimity instruction." *North I, supra*, 910 *F.*2d at 875; *accord United States v. Ryan, supra*, 828 *F.*2d 1010; *United States v. Mangieri*, 694 *F.*2d 1270 (D.C.Cir.1982).

III

[4] Although such a charge should be granted on request, in the absence of a specific request, the failure so to charge does not necessarily constitute reversible error.

Many federal courts have concluded that absent a specific request, "a general instruction on the requirement of unanimity suffices to instruct the jury they must be unanimous on whatever specifications they find to be the predicate of the guilty verdict." *United States v. Natelli*, 527 *F.*2d 311, 325 (2d Cir.1975), *cert. denied*, 425 *U.S.* 934, 96 *S.Ct.* 1663, 48 *L.Ed.*2d 175 (1976); *see also United States v. Bedonie*, 913 *F.*2d 782, 792 (10th Cir.1990) (absent specific request, general instruction was sufficient); *United States v. Beros*, 833 *F.*2d 455, 462–63 (3d Cir.1987) (failure to give specific unanimity instruction on defendant's request constituted abuse of discretion and required reversal); *United States v. Ryan*, *supra*, 828 *F.*2d at 1020 ("prudence counsels the trial court to give an augmented unanimity instruction if the defendant requests such a charge"). The circumstances of the case before us suggest a paraphrase of the holding in *United States v. Mangieri*, *supra*, 694 *F.*2d 1270:

> [Our jurisdiction], along with others, has not heretofore adopted a rule requiring the particularized instruction. [Defendants'] trial counsel * * * failed to object to the instruction * * * In the context of that entire charge and the whole trial, we must conclude that a conscientious juror would have understood that he [or she] must agree with the other jurors [as to the specifications they find to be the predicate of the guilty verdict]. [*Id.* at 1281.]

[5] For in the last analysis, when we review the issue as a matter of plain error, the question is whether the instructions were clearly capable of producing an unjust result. *See R.* 2:10–2. This not a case in which a court incorrectly stated general principles. The "jury instructions cannot be read as sanctioning a nonunanimous verdict." *State v. Jennings*, 216 *Conn.* 647, 663, 583 *A.*2d 915, 924 (1990). The court correctly instructed the jury that it must be unanimous in its verdict. The core question is, in light of the allegations made and the statute charged, whether the instructions "as a whole [posed] 'a genuine risk that the jury [would be] confused.'" *North II*, *supra*, 920 *F.*2d at 951 (quoting *United States v. Duncan*, *supra*, 850 *F.*2d at 1114).

Returning to the factors cited in *United States v. Ryan*, *supra*, 828 *F.*2d at 1020, we must ask whether the allegations in the misconduct count were contradictory or only marginally related to each other and whether there was any tangible indication of jury confusion. The indictment for official misconduct channeled the jury's inquiry, reciting that the teacher had engaged "in a continuing course of conduct which sexually abused, humiliated and otherwise endangered the welfare of children while [she] had a legal duty to care for the children and had assumed responsibility for their care." The acts cited certainly formed a core of conceptually-similar acts relating to the students' educational relationship with the teacher and her abuse of that relationship. We agree with the analysis in the Attorney General's brief to this Court:

> It is apparent that the acts in [the official-misconduct count] allegedly committed by defendant are not conceptually distinct. All refer to conduct which can endanger a child, either physically or mentally. Abuse includes using obscene language in the presence of a child or performing any act or deed in the presence of the child which could debauch the child's morals. Humiliation includes making the victim feel degraded. Endangering the welfare of a child includes engaging in conduct that would render a child an abused or neglected child. The evidence in this case, which included defendant forcing the victims to look at pornographic magazines, as well as cutting out pictures from them and creating "collages," which included defendant informing the victims of her sexual desires, which included defendant using foul language and telling the class that a child was menstruating, * * * clearly constituted abusive, humiliating conduct which "involved subjecting the victims to either active or passive participation in ... activity in a manner harmful to their physical or mental health." *State v. Spigarolo*, 210 *Conn.* 359, 391, 556 *A.*2d 112, 129 (1989), *cert. denied* — *U.S.* —, 110 *S.Ct.* 322, 107 *L.Ed.*2d 312 (1989). Because the acts alleged were conceptually similar, there was no reason to give a specific unanimity charge.

Furthermore, the jury never exhibited any signs of confusion. Early in its deliberations, the jury asked to be recharged on the official-misconduct charge and on the endangerment charge and asked for copies of the statutes associated with both charges. In so doing, the jury did not indicate that it was confused concerning its responsibility to reach a unanimous verdict. In contrast, juries in other cases have asked questions that showed their confusion regarding the unanimity issue. See *United*

States v. Duncan, supra, 850 *F.*2d at 1114–15 (in case involving false statements on tax return, jury's request for clarification concerning whether it had to agree on which statement defendant knew to be false manifested a tangible risk of jury confusion); *United States v. Echeverry, supra*, 719 *F.*2d at 975 (jury's written questions concerning whether it could consider multiple conspiracies indicated its confusion). Rather than confused, this was a "conscientious" and sophisticated jury. *Mangieri, supra*, 694 *F.*2d at 1281. It carefully sifted through all of the evidence as shown by its unanimous acquittal of defendant on some counts, its report of non-unanimity on other counts, and its unanimous verdict of guilt on the official-misconduct count. Thus, we are confident that there was no juror confusion in this case, and find that the general unanimity instructions were sufficient.

IV

Defendant argues that because she was not convicted of the other criminal acts alleged in the indictment, she could not be found guilty of official misconduct. Defendant argues that the acts she performed (for example, exhibiting the sexually-explicit magazines) cannot provide a basis for official misconduct because those acts were not found to be criminal. We disagree.

[6, 7] *N.J.S.A.* 2C:30–2(a) provides:

> A public servant is guilty of official misconduct when, with purpose to obtain a benefit for himself or another or to injure or to deprive another of a benefit:
>
> a. He commits an act relating to his office but constituting an unauthorized exercise of his official functions, knowing that such act is unauthorized or he is committing such act in an unauthorized manner[.]

Nothing in the statute suggests that the underlying act must be criminal in nature. Thus, charges of official misconduct may be sustained without proof of a criminal act. *See State v. Stevens*, 203 *N.J.Super.* 59, 66, 495 *A.*2d 910 (Law Div.1984) ("if the actions set forth in [the] indictment [alleging official misconduct] constitute a breach of [an official] duty, whether broadly or narrowly described, the indictment is sufficient"),

aff'd, 222 *N.J.Super.* 602, 537 *A.*2d 774 (App.Div.1988), *aff'd*, 115 *N.J.* 289, 558 *A.*2d 833 (1989); *State v. Gleitsmann*, 62 *N.J.Super.* 15, 161 *A.*2d 747 (App.Div.) (police officer's personal use of police car and municipal telephone constituted official misconduct), *certif. denied*, 33 *N.J.* 386, 164 *A.*2d 849 (1960). To be guilty of official misconduct, a defendant must have performed the underlying act in order to obtain some benefit or to injure another. The benefit need not be pecuniary in nature and the injury need not be physical. J. Cannel, *N.J. Criminal Code Anno.* 2C:27-1 comment 3 (1991); *see also State v. Stevens*, *supra*, 115 *N.J.* 289, 558 *A.*2d 833 (police officer who conducted strip searches of women to gratify his sexual interests acted with purpose to obtain benefit); *State v. Scirrotto*, 115 *N.J.* 38, 46, 556 *A.*2d 1195 (1989) (benefit need not be pecuniary to satisfy bribery statute).

[8] The State introduced evidence at trial that defendant had exhibited sexually-explicit magazines to her students; that she had had the children make cut-outs from those magazines; and that she had discussed her sexual proclivities and those of others with her students. All of those acts were unauthorized and were performed in the course of the exercise of her official function as teacher, presumably, as the jury could have found, to satisfy her own interests. If believed by the jury, defendant's course of conduct would undoubtedly constitute official misconduct.

V

Ordinarily, a general instruction on the requirement of unanimity suffices to instruct the jury that it must be unanimous on whatever specifications it finds to be the predicate of a guilty verdict. There may be circumstances in which it appears that a genuine possibility of jury confusion exists or that a conviction may occur as a result of different jurors concluding that a defendant committed conceptually distinct acts. We hold that when there is such a danger of a fragmented verdict, the

court must instruct a jury, on request, that if a guilty verdict is returned, the jury must be unanimous on the underlying facts. Such a charge was not requested here. We are satisfied that in the circumstances of this case, there was no genuine possibility of jury confusion about its responsibility unanimously to find defendant guilty of official misconduct on the specifications charged.

The judgment of the Appellate Division is affirmed.

POLLOCK, J., dissenting.

Because the rule requiring a unanimous verdict of guilt in criminal trials is "fundamental," doubt about the jury's consensus strikes at the heart of a defendant's right to a fair trial. *See State v. Reynolds*, 41 *N.J.* 163, 187, 195 *A.*2d 449 (1963), *cert. denied*, 377 *U.S.* 1000, 84 *S.Ct.* 1930, 12 *L.Ed.*2d 1050 (1964); *State v. Cordasco*, 2 *N.J.* 189, 202, 66 *A.*2d 27 (1949); *R.* 1:8–9. I agree with the majority that generally the trial court must give a specific unanimity instruction when confronted with the danger of a fragmented verdict. *Ante* at 637. I differ, however, with the application of that rule to this case. Consequently, I would reverse defendant's conviction for official misconduct and remand for retrial on that charge.

For several years before the present incident, defendant, Ruth Parker, had taught perceptually-impaired nine- to eleven-year-old students in North Bergen. On February 19, 1986, in response to a parental complaint, two school administrators searched Parker's classroom. In her closet, the two administrators found a bottle of rum and an envelope containing several pornographic magazines. The principal suspended Parker and interviewed her students. During these interviews and before the grand jury, the students recounted incidents in which Parker had solicited certain students to bring liquor and pornographic magazines from their homes, had instructed students to make collages and drawings from the pornography, had participated in the pornographic artwork, had cursed at students, had

enclosed students in cardboard boxes or made them write words or phrases one hundred times when they misbehaved, had changed students' answers on tests and homework, had told the class when a student was menstruating, had told students that she wanted to sleep with the school principal, and had told students that the art teacher was a drug addict and that the gym teacher was a lesbian.

A Somerset County grand jury indicted Parker, charging her with four counts of sexual assault, one count of attempted sexual assault, five counts of endangering the welfare of children, and one count of official misconduct. On the official misconduct count, the indictment repeated the statutory elements of the crime and stated that Parker had engaged "in a continuing course of conduct which sexually abused, humiliated and otherwise endangered the welfare of children while [she] had a legal duty to care for the children." Although the indictment contains eleven counts of criminal conduct, it never specifies even the superficial details of that conduct. Except for the counts involving physical sexual abuse, the indictment leaves to speculation how Parker "humiliated" or otherwise "endangered" the welfare of her students. Her attorney neither challenged the indictment nor requested a bill of particulars.

At trial, moreover, without objection from Parker's attorney, the State elicited from the student witnesses the details of the alleged crimes. Their testimony was problematic. It deviated significantly from their taped interviews and their grand jury testimony. Several of the students who had claimed that Parker had touched them sexually or that they had witnessed Parker touching other students recanted their earlier statements. On cross-examination, many admitted to having lied before the grand jury and to having fabricated parts of their stories. As the Appellate Division noted, the State's case was "replete with recantation, contradiction, inconsistencies and confusion."

At the close of trial, the jury was faced with a pastiche of discrete acts, any of which could arguably support convictions for official misconduct and child endangerment. The trial court charged the jury that to convict Parker of official misconduct it must find that (1) she had been a public servant; (2) she had acted with a purpose to gain a benefit; (3) the act had related to her office; (4) the act had been unauthorized or performed in an unauthorized manner; and (5) she had known the act was unauthorized or performed in an unauthorized manner. Although the court instructed the jury on the need for a unanimous verdict, it never explained that the jury must unanimously agree on the conduct constituting the requisite "unauthorized act." The charge indicated that to convict Parker of official misconduct, the jury need only agree unanimously that Parker had committed some undefined "unauthorized act." Defense counsel neither objected to the charge nor requested a specific instruction on unanimity.

After deliberating over a period of three days, the jury acquitted Parker of all of the sexual assault charges and could not reach a decision on either the attempted sexual assault charge or the five counts of endangering the welfare of children. It convicted her of official misconduct. The trial court sentenced Parker to five years in prison.

In an unreported decision, the Appellate Division affirmed the conviction, with one judge dissenting. Although Parker did not raise the issue of jury unanimity before the Appellate Division, that issue was the focus of the dissent. The dissent argued that the peculiar circumstances of this case were "the perfect setting for a patchwork verdict." Finding that the failure to give a specific "unanimity" instruction violated Parker's right to a unanimous jury, the dissent would have reversed Parker's conviction. I agree.

I share the majority's revulsion at the acts charged. Nonetheless, every defendant, even one charged with loathsome offenses, is entitled to a fair trial. The vagueness of the

indictment, the confusing and contradictory trial testimony, the disturbing nature of the numerous allegations, and the vagueness of the official misconduct statute created a real danger of jury confusion. Parker's actions, moreover, were not sufficiently similar to constitute one continuing offense. These circumstances lead me to conclude that the trial court committed plain error in not providing a specific charge on unanimity. In sum, the charge deprived defendant of the right to a fair trial.

-I-

As the majority recognizes, trial courts must give specific "unanimity" instructions when a jury is likely to be confused or to render a "fragmented verdict." *Ante* at 637. A general charge on unanimity may not suffice " 'where the allegations in a single count [of an indictment] are either contradictory or only marginally related to one another * * * or where there is a variance between the indictment and the proof at trial * * * or where there is a tangible indication of jury confusion.' " *Ante* at 636–637 (citing *United States v. Ryan*, 828 *F.*2d 1010, 1020 (3d Cir.1987)). Although the *Ryan* factors offer guidance, the ultimate test is whether a genuine potential for jury confusion existed. *Ante* at 636; *see United States v. Beros*, 833 *F.*2d 455, 460 (3d Cir.1987).

Neither the majority nor I can identify the act or acts that the jury unanimously found Parker had committed. In short, the jury may have convicted Parker without agreeing unanimously on what wrong she had committed. Various considerations suggest that result. For example, the State alleged numerous alternative methods of committing the single crime of official misconduct. See *State v. Lomagro*, 113 *Wis.*2d 582, 592, 335 *N.W.*2d 583, 589 (1983) (right to unanimous verdict implicated when State alleges alternative means of committing one crime). In that context, as the majority correctly notes, a specific "unanimity" instruction is required if the modes are

"conceptually distinct." *Ante* at 634; *see United States v. Gipson*, 553 *F.*2d 453, 458 (5th Cir.1977); *Lomagro, supra*, 113 *Wis.*2d at 592, 335 *N.W.*2d at 587. Like the majority, *ante* at 636, I recognize the analytical limitations of the "conceptual distinction" test, *see Schad v. Arizona*, — *U.S.* ——, ——, 111 *S.Ct.* 2491, ——, — *L.Ed.*2d ——, —— (1991). That test, however, is as useful as any other articulation to determine whether a defendant's trial was fundamentally fair.

The rationale of the "conceptual distinction" test is that in certain cases, separate acts are so similar that they are essentially one continuous act for the purposes of jury unanimity. *See United States v. Frazin*, 780 *F.*2d 1461, 1468 (9th Cir.), *cert. denied*, 479 *U.S.* 844, 107 *S.Ct.* 158, 93 *L.Ed.*2d 98 (1986) (no specific instruction required because although government alleged different acts, acts comprised continuing scheme); *Lomagro, supra*, 113 *Wis.*2d at 593, 335 *N.W.*2d at 590. If the acts share continuity in time, victim, manner, and perpetrator, that the jury mentally separated them and somehow disagreed on which of the different acts defendant had committed is unlikely. *Cf. United States v. Payseno*, 782 *F.*2d 832, 836–37 (9th Cir.1986) (specific instruction required because government alleged three alternative acts involving separate victims, occurring at different times and different locations, and using different methods); *United States v. Echeverry*, 698 *F.*2d 375, 377, *modified*, 719 *F.*2d 974 (9th Cir.1983) (specific instruction necessary when jury mentally separated one conspiracy charged in indictment into two different conspiracies).

The majority agrees with the Attorney General that the acts alleged in the official misconduct charge are not conceptually distinct. *Ante* at 639. I disagree. As pointed out by the dissent below, "the alleged incidents ranged over fifteen weeks and included conduct of widely varying quality and gravity." The incidents involved different students, who testified with differing levels of credibility. More importantly, the alleged acts were substantively different, and some of them were more believable than others. The State's proof involved numerous

discrete acts falling within wholly different conceptual groupings. Some of the incidents are arguably "conceptually similar" in that they all involved sexual misconduct: the distribution of pornographic magazines, the touching, the discussions of Parker's and other teachers' sexual proclivities, and the announcement of a student's menstrual cycle. In addition to the charges of sexual misconduct, however, the State sought to prove that Parker had punished the class by enclosing them in cardboard and by forcing them to write phrases 100 times, that she had solicited a student to bring liquor to class, that she had changed the answers on certain students' tests and homework, and that she had cursed at the class. The difference in the acts is obvious. They differ in their nature, seriousness, and motivation. Even if the alleged acts of sexual misconduct were similar, the other acts could not be consolidated for the purposes of jury unanimity.

By consolidating acts that share only a general similarity within the same conceptual grouping, the majority eviscerates the rule requiring unanimity on the underlying act. Its conclusion that the acts alleged "formed a core of conceptually-similar acts relating to the students' educational relationship with the teacher and her abuse of that relationship," *ante* at 638–639, essentially means that juries need agree on only the general elements of the crime, not the underlying acts. Thus, under the majority's analysis, to convict Parker of official misconduct, the jury need have agreed only that she had committed "unauthorized acts" in her teaching position. Such an analysis renders meaningless the rule requiring unanimity on the underlying act. Essentially, the majority authorizes a jury to convict when it has only a generalized suspicion that the defendant did something bad but cannot agree what the defendant did.

In addition to the myriad of discrete acts alleged by the State, other factors contributed to the potential for jury confusion in this case. The vagueness of the misconduct statute permitted the jury to convict Parker without agreement on the substantive basis for the conviction. That statute does not criminalize

any specific behavior; rather, it prohibits any intentional "unauthorized" act by a public official acting within the scope of employment. See *N.J.S.A.* 2C:30–2. It is "necessarily broad" so as to cover a wide variety of misbehavior by public officials. *State v. Begyn*, 34 *N.J.* 35, 49, 167 *A.*2d 161 (1961). In the absence of more specific jury instructions, that breadth creates the risk that a jury may convict a defendant of official misconduct simply because it finds that he or she acted immorally. *See State v. Cohen*, 32 *N.J.* 1, 11, 158 *A.*2d 497 (1960) (Weintraub, C.J., concurring) (broad construction of official misconduct statute would result in tyranny of vagueness); *State v. Winne*, 12 *N.J.* 152, 183, 96 *A.*2d 63 (1953) (Wachenfeld, J., dissenting) (act not crime merely because it is wrong). In this case, the breadth of the statute may have caused the jury to convict Parker based on a vague notion that she had done something immoral. As the dissenting judge below stated, the jury, confronted by a disturbing array of acts, understandably may have been "attracted to a charge that seemed expansive and vague enough to absorb and express the individual doubts each juror had about defendant's general behavior."

As the United States Supreme Court recently acknowledged, the notion that "no person may be punished criminally save upon proof of some specific illegal conduct" is "so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Schad, supra*, — *U.S.* at ——, 111 *S.Ct.* at ——, — *L.Ed.*2d ——. *Schad* is a plurality opinion in which the Court held that due process did not require a specific "unanimity" instruction when the state murder statute characterizes premeditated and felony murder as a single crime and the prosecution presents both theories to the jury. *Id.* at ——, 111 *S.Ct.* at ——, — *L.Ed.*2d at ——. Writing for the plurality, Justice Souter acknowledged that due process would not permit a crime "so generic that any combination of jury findings of embezzlement, murder, tax evasion or littering would suffice for conviction." *Id.* at ——, 111 *S.Ct.* at ——, — *L.Ed.*2d at ——. On the facts of that case, however, he

concluded that states could reasonably define felony and premeditated murder as alternative means of committing the single crime of murder. *See ibid.*

In the present case, the offense of official misconduct is so vague that it conjures up Justice Souter's generic crime. *Ibid.* The problem here, however, is not merely the vagueness of the statute, indictment, and jury charge, but also the contradictory nature of the State's proofs. That combination engendered the genuine possibility that the jury did not agree what "specific illegal conduct," *id.* at ——, 111 *S.Ct.* at ——, — *L.Ed.*2d at ——, Parker had committed. *See McKoy v. North Carolina*, 494 *U.S.* 433, 449 n. 5, 110 *S.Ct.* 1227, 1237 n. 5, 108 *L.Ed.*2d 369, 385 n. 5 (1990) (Blackmun, J., concurring) (general requirement that jury need not agree on preliminary factual issues limited by exception requiring substantial agreement on principal factual elements underlying specified offense). The effect was to deprive Parker of her fundamental right to a conviction based on proof of specific illegal acts. *See Schad, supra*, — *U.S.* at ——, 111 *S.Ct.* at ——, — *L.Ed.*2d at ——.

Neither the indictment, the summations, nor the jury charge narrowed the circumstances under which the jury could convict Parker. On the contrary, they contributed to the erroneous notion that the jury need agree only that Parker had committed an unauthorized act relating to her duties as a teacher.

The indictment vaguely alleged that Parker had engaged in a continuing course of conduct that sexually abused, humiliated, and endangered the welfare of her students. The differing verdicts on the several counts suggest that the jury thought that it could choose among the alleged acts. After acquitting defendant of sexual abuse and disagreeing on the other charges, the jury could have concluded that "humiliating" students constituted official misconduct.

Finally, the jury instructions exacerbated the potential for a fragmented verdict. The trial court charged the jury that its verdict must be unanimous. The court informed the jury,

however, that to convict of official misconduct, it need find only that Parker had committed an "unauthorized act relating to her position as a public servant. On the second day of its deliberations, the jury asked the trial court to repeat the charge on official misconduct and endangerment. It also asked to see a copy of the official misconduct and endangerment statutes. Paralleling the elements of the broad statute, the supplemental charge, like the original one, served only to reinforce the premise that the jury could convict Parker of official misconduct if it unanimously found that she had "humiliated" her students in some undefined, undescribed way.

Because defense counsel did not object to the charge, the matter arises as one of plain error. The test is whether the error "possessed a clear capacity to bring about an unjust result." *State v. Hock*, 54 *N.J.* 526, 538, 257 *A.*2d 699, *cert. denied*, 399 *U.S.* 930, 90 *S.Ct.* 2254, 26 *L.Ed.*2d 797 (1970). Here, the described error had that capacity. The charge directed the jury that to convict Parker of official misconduct, it need not unanimously agree on the act that she had committed. The indictment, the testimony, the jury charge, and the elements of the crime reinforced the error that the jury could convict Parker of official misconduct simply if it believed that she had done some undefined bad acts. Apparently, the despicable nature of the charged conduct impelled the jury towards conviction, but the State's case was so weak that the jury could not convict defendant of a specific substantive crime. Following the court's charge, however, the jury may have gravitated toward the generic crime of official misconduct, which enabled them to convict her without agreeing on the basis of that conviction. Under these circumstances, I am constrained to find that Parker was denied her right to a unanimous jury verdict.

Accordingly, I would reverse the judgment of the Appellate Division and remand for a new trial.

CLIFFORD, J., joins in this opinion.

For affirmance—Chief Justice WILENTZ, and Justices HANDLER, O'HERN and GARIBALDI—4.

For reversal—Justices CLIFFORD and POLLOCK—2.

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592 A.2d 240

RONALD AND LINDA URBAN, IRA SCHULMAN, ROBERT R. ZANES, AND DAVID AND JUDY DELANEY SHIRLEY, PLAINTIFFS, AND RAYMOND M. TOMASSO, JR., RAYMOND TOMASSO, SR. AND DOROTHY TOMASSO, PLAINTIFFS-APPELLANTS, v. PLANNING BOARD OF THE BOROUGH OF MANASQUAN, MONMOUTH COUNTY, NEW JERSEY, DEFENDANT-RESPONDENT.

Argued January 28, 1991—Decided July 18, 1991.

SYNOPSIS

Landowners challenged borough planning board's denial of subdivision applications. The Superior Court, Law Division, Monmouth County, entered prerogative writ judgments setting aside board's denial. Board appealed. The Superior Court, Appellate Division, 238 N.J.Super. 105, 569 A.2d 275, reversed in part and affirmed in part and certified question. The Supreme Court, O'Hern, J., held that subdivision of an existing nonconforming parcel of land occupied by several dwelling structures, into multiple nonconforming lots accommodating each of the structures, may be granted only on approval of necessary variances by municipal planning board.

Affirmed as modified and remanded.

RECORD IMPOUNDED

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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
A-4181-86T2

STATE OF NEW JERSEY,

Plaintiff-Respondent

v.

RUTH PARKER,

Defendant-Appellant

Argued November 28, 1989 - Decided June 6, 1990

Before Judges Michels, Deighan and R.S. Cohen.

On appeal from Superior Court, Law Division, Hudson County.

Russel D. Teschon argued the cause for appellant (Teschon & Kooreman, attorneys; Jack Kooreman and

Philip M. Lembo on the brief)

Catherine A. Foddai argued the cause for respondent (Peter N. Perretti, Jr.; Attorney General; Chana Barron, Deputy Attorney General, of Counsel, on the brief).

The opinion of the court was delivered by

DEIGHAN, J.A.D.

On June 11, 1986, defendant Ruth Parker was charged with one count of second-degree official misconduct contrary to, N.J.S.A. 2C.30-2a (count one); four counts of second-degree sexual assault, contrary to N.J.S.A. 2C:14-2b (counts two, three, four end five); one count of second-degree attempted sexual assault contrary to N.J.S.A. 2C:5-1 and 2C:14-2c(5) (count six), and five counts of third-degree endangering the welfare of children, N.J.S.A. 2C:24-4a (counts seven, eight, nine, ten and eleven). Defendant pled not guilty to all charges. Prior to trial, the trial judge granted defendant's motion to dismiss count three.

The jury found defendant guilty on count one and acquitted her of counts two, four and five. The jury was unable to reach a verdict on the remaining counts. Defendant made a motion for arrest of judgment after the verdict, R. 3:18-2, which was denied for having been filed untimely. Defendant' was sentenced to a five-year custodial term, $1,000 fine and a $30 penalty payable to the Violent Crimes Compensation Board were imposed.

Count one of the indictment charged that defendant, in the capacity of a school teacher, committed the crime of official misconduct. It specifically alleged that she "did engage in a continuing course of conduct which sexually abused, humiliated and otherwise endangered the welfare of children [for whom] she had a duty of care," contrary to N.J.S.A. 2C:30-2a.

Count two, sexual assault, second degrees charged that defendant committed "an act of sexual contact" upon a child referred to as "H.Z." by "intentionally touching the intimate parts of H.Z. and sexually gratifying" herself. The indictment specifically indicated that at the time of the alleged conduct, H.Z. was less than 13 years old and defendant was at least four years older than him. N.J.S.A. 2C:14-2b.

Counts four, five and six, likewise charged defendant with -sexual assault, second degree, on other children in her class, specifically those referred to as S., R.S., and R.A.S.

Count seven charged defendant with endangering the welfare of children, specifically that defendant, while having a legal duty for the care of H.Z. and having assumed responsibility for his care, engaged in "sexual conduct which would impair and debauch the morals of H.Z. and did cause H.Z. harm that would make H.Z. an abused and neglected child." N.J.S.A. 2C:24-4a. Counts eight through eleven similarly charged defendant with endangering the welfare of other children, specifically P.W., T.W., R.S., E.L. and I.V.

The State produced evidence that between November 1985 and February 1986, defendant would sit with several of her students in the back of the classroom looking at Playgirl, Playboy and Penthouse magazines. According to the testimony, defendant and the children would cut out pictures from the magazines and paste them on blank pieces of paper or draw genitalia on the pictures in the magazines. Defendant allegedly told her students that she had sexual desires for school administrator Robert Kronberg and informed her class that one of her colleagues was a lesbian and another injected drugs intravenously. Several students allegedly saw defendant touch or try to touch some of their classmates' private areas.[1] Defendant reportedly used foul language in the classroom. On one occasion defendant allegedly informed the entire class that S.S., an eleven-year-old student, was menstruating.

There was also testimony that defendant had encouraged a student, H.Z., to bring liquor into school. H.Z. brought in a bottle of liquor which defendant kept in the closet with the magazines. A number of students claimed that they saw the bottle and were aware of its presence in the classroom.

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[1] With the exception of R.A.S., who testified that defendant tried to touch her, the other children who had previously claimed (in either grand jury testimony or in the interviews with Mr. Kornberg) to have been touched, or seen other students touched by defendant, denied at trial that such touching had occurred.

The State's proofs were replete with recantation, contradiction, inconsistencies and confusion. As a result, the jury acquitted defendant of counts two, four and five and was unable to reach a verdict on counts seven, eight, nine, ten and eleven.

On appeal, defendant presents the following issues:

I The indictment charging defendant, Ruth Parker, with Official misconduct is fatally defective in that it fails to allege with specificity any facts supporting the conclusion.

II The trial court's charge to the jury as to official misconduct was misleading, legally insufficient, and resulted in a conviction of defendant in violation of a right to due process of law.

III Due process requires a narrow construction of criminal statutes, therefore the acts of wrongdoing by the-defendant as alleged by the state do not constitute a violation of N.J.S.. 2C:30-2.

IV The denial of defendant's motion for acquittal brought upon completion of the State's case was reversible error.

V The verdict, being against the weight of the evidence, and constituting a manifest injustice, should be reviewed and reversed.

From our thorough review of the record we are satisfied that there is no merit to the issues raised by defendant under Points I, II, IV and V. R. 2:11-3(e)(2). Nevertheless, we add the following comments.

I

Defendant's first argument is that count one of the indictment, charging her with official misconduct, was deficient. In particular, she argues that count one did not specify what legal duty she violated or what was the source of that duty. Defendant did not timely raise this issue below. Pursuant to R., 3:10-2, an argument that the indictment is deficient must be raised by motion before trial; "[f]ailure to so present [this] defense constitutes a waiver thereof, but the court for good cause shown may grant relief from the waiver." Defendant has not presented any cause for her failure to raise this argument before trial and therefore she has waived this defense. State v. Del Fino, 100 N.J., 154, 160 (1905). The failure of a timely assertion, even of constitutional rights, may result in a waiver. Ibid.

In her second issue, defendant' contends the charge was misleading and deficient because it did not define or explain the terms "an act," "unlawful behavior" or "an act relating to her office." This issue was not raised below and therefore it will not constitute ground for reversal unless it amounted to plain error.[2] R. 1:7-2; R. 2:10-2. The Supreme Court has stated that a jury charge will not qualify as plain error unless th language used constitutes

> legal impropriety in the charge prejudicially affecting the substantial rights of the defendant and sufficiently grievous to justify notice by the reviewing count and to convince the court that of itself the error possessed a clear capacity to bring about an unjust result. [State v. Hock, 54 N.J. 526, 538 (1969), cert. den., 399 U.S. 930 (1970).]

[2] Defendant's brief states that defense counsel timely objected to this charge. However, this objection was based on the trial judge's misstatement of a statutory phrase and defendant requested only that the judge state the relevant phrase. Thus, contrary to what defendant urges, this argument was not raised below.

We find that there was no error in the charge, much less prejudicial error. Moreover, there was evidence from which the jury could find that defendant had engaged in acts of misconduct. See State v. Macon, 57 N.J. 325, 335 (1971); Hock, 43 N.J. at 435-436.

Under Point IV, defendant contends that the trial court erred in denying her motion for an acquittal, made at the completion of the State's case. R. 3:18-1. However, "viewing the State's evidence in its entirety . . . and giving the State the benefit of all its favorable testimony as well as all of the favorable inferences which reasonably could be drawn therefrom, a reasonable jury could find guilt of the charge beyond a reasonable doubt." State v. Reyes, 50 N.J. 454, 458-459 (1967) (citations omitted); accord State v. Brown, 80 N.J. 587, 591 (1979). The State submitted evidence as outlined above from which the jury could find that the defendant was guilty of misconduct as charged in the first count. We find no error in denying defendant's motion for a judgment for acquittal.

Under Point IV, defendant also argues that the verdict was against the weight of the evidence. Since defendant did not move before the trial court for a new trial, this issue is not cognizable on appeal. R. 2:10-1. However, even if this court could properly consider this issue, defendant's argument is without merit.

A reading of defendant's brief indicates she is actually arguing that the evidence upon which her conviction was based was not credible. However, the issue of credibility is for the jury to decide, not an appellate court. State v. Haines, 18 N.J. 550, 565 (1955). Moreover, the jury's verdict should not be disturbed "[u]nless it clearly and unmistakenly appears that there was a miscarriage of justice under the law." R. 2:10-1; R. 4:49-1a. There is no such indication here.

II

As to Point III, defendant contends the acts of wrongdoing as alleged by the State do not constitute a violation of N.J.S.A. 2C:30-2a. This again is another approach to challenge the insufficiency of the indictment. This must be raised by motion before trial. R. 3:10-2. Nevertheless, count one, charging official misconduct, does allege the elements of the crime. In the prosecution for official misconduct under N.J.S.A. 2C:30-2, the State must prove five material elements: (1) that the defendant was a public servant; (2) that the defendant acted with a purpose to gain a benefit herself, (3) that as a public servant defendant committed an act relating to the office; (4) that the act was unauthorized or performed in an unauthorized manner, and (5) that the defendant knew that the act was unauthorized or was performed in an unauthorized manner. 33 N.J. Practice, (Miller-Criminal Law), @sechd@261 at 312. The trial judge read to the jury the indictment and statute and charged the jury as to the above elements which it must find in order to convict defendant.

Official misconduct is not defined in the New Jersey Code of criminal Justice. "Misconduct in office" has been defined as any act or omission in breach of a duty of public concern by one who has accepted public office; it is also defined as the violation of a prescribed duty to the public for which the offender may be indicted at common law. State v. Furey, 128 N.J. Super. 12, 17-18 (App. Div. 1974); accord, State v. Maioranna, 225 N.J. Super. 365, 369 (Law Div. 1988). Definitions of misconduct in office are necessarily broad. State v. Begyn, 34 N.J. 35 (1961; accord, Maioranna at 369.

Under N.J.S.A. 2C:30-2, in order to be guilty of official misconduct, a public servant must have acted "with purpose to obtain benefit for himself." In State v. Stevens, 222 N.J. Super. 597 (App. Piv. 1988), a defendant police officer, who had used his position of authority to intimidate females into submitting to illegal strip searches to satisfy or gratify this prurient interests, was found to have acted with the purpose to obtain a benefit for himself as required under N.J.S.A. 2C:30-2.

The duties of a teacher arise out of the very nature of the office itself. Therefore, there was no need for defendant's duties to be pleaded in the indictment. See State v. Winne, 12 N.J. 152, 179 (1953); State v. Weleck, 10 N.J. 355, 366 (1952); State v. Stevens, 203 N.J. Super. 59, 64-65 (Law Div. 1984), aff'd, 22 N.J. Super. 602 (App. Div. 1988), certif. den., 111 N.J. 575 (1988).

Here, count one of the indictment charges that defendant "did commit the crime of official misconduct . . . with [a purpose] to obtain a benefit for herself," as "a public service [which] constituted an unauthorized exercise of her official functions, knowing that such act was unauthorized and was committed in an unauthorized manner . . . [in that she] engaged in a continuing course of conduct which . . . endangered the welfare of children." Although an indictment for official misconduct must allege the facts upon which it is based, State v. Winne, 12 N.J. 152, 179 (1953); State v. Weleck, 10 N.J. 35-5, 366 (1952); State v. Stevens, 203 N.J. Super. 59, 64-65 (Law Div. 1984), aff'd, 22 N.J.Super. 602 (App. Div. 1988), certif. den. 111 N.J. 575 (1988), "[n]evertheless, an indictment is merely a pleading device and never an end in itself." State v. LeFurge, 101 N.J. 4, 419 (1986); accord, State v. LaFera, 35 N.J. 75, 81 (1961). Since the indictment alleges all the essential facts of the crime of official misconduct, the indictment could not have been dismissed unless its insufficiency is palpable. State v. New Jersey Trade Waste Ass'n., 96 N.J. 8, 19 (1984), citing State v. LaFera, 35 N.J. at 81. We find no insufficiency in the indictment.

Any supplementary information, reasonably relevant and explanatory of the accusation, may now be obtained by a request for a bill of particulars, R. 3:7-5; State v. Engels, 32 N.J. Super. 1, 7 (App. Div. 1954), and broad discovery under R. 3:13-3.

III

Plaintiff's argument under Point V that the verdict was against the weight of the evidence blended with her arguments under Point IV claiming error in denying her motion for acquittal. She points to Point IV to support her contentions under Point V and in addition argues that "the facts in this case are so clear, and the inconsistency and unreasonableness of the verdict rendered so manifest, that it cries out for review by this court." She then argues that "[i]f the Jury was unable to find beyond a reasonable doubt that defendant committed any of the specific criminal acts alleged in the indictment, how could they have found her guilty of the crime of official misconduct, for which the same criminal acts presumably formed the basis?"

In essence, defendant argues that the verdict on count one was inconsistent since she was not convicted of the criminal acts alleged in counts two through eleven. However, it is well-established that consistency in verdicts is not required because each charge is to be considered separately. See United States v. Powell, 469 U.S. 57, 64-65, 105 S.Ct. 471, , 83 L.Ed.2d 461, 467-469 (1984); Dunn v. United States, 284 U.S. 390, 393, 52 S.Ct. 189, 76 L.Ed. 356 (1932); State v. Peterson, 181 N.J. Super. 261, 267 (App. Div. 1981), certif. den., 89 N.J. 413 (1982). Factual inconsistency in verdicts exists only if an acquittal on one count vitiates an element of another count of which defendant was convicted. See United States v. Hannah, 584 F.2d 27 (3d Cir. 1984); Peterson, 181 N.J. Super. at 265-266 (App. Div. 1981); State v. Hawkins, 178 N.J. Super. 321, 323 (App. Div. 1981), certif. den., 87 N.J. 382 (1981); State v. Conquest, 152 N.J. Super. 382, 389-390 (Law Div. 1977).

In State v. Quill, 112 N.J. Super. 368 (App. Div. 1970), certif. den., 57 N.J. 600 (1971) this court noted that the modern and majority rule, is than consistency between the verdicts on the several counts of an indictment or on several indictments, each charging substantially the same offense, is unnecessary where defendant is convicted on one or some counts or indictments but acquitted on others. Such a conviction will generally be upheld irrespective of its rational incompatibility with the acquittal. See Dunn v. United States, 284 U.S. 390, 393, 52 S.Ct. 189, 76 L.Ed. 356 (1932); see Annotation, 18 A.L.R.3d 259, 274 and cases cited therein. In Dunn, Justice Holmes wrote,

> Consistency in the verdict is not necessary. Each count in an indictment is regarded as if it was a separate indictment. If separate indictments had been presented *** and had been separately tried, the same evidence being offered in support of each, an acquittal on one could not be pleaded as res judicate of the other. Where the offenses are separately charged in the counts of a single indictment the same rule must hold. [284 U.S. at 393, 52 S.Ct. at 190]

New Jersey specifically adopted the Dunn rule in State v. Roller, 29 N.J. 339, 348-49 (1959); see State v. Coleman, 46 N.J. 16 (1965) (no basis to upset guilty verdict under indictment charging defendant with wife's murder as inconsistent with or contradictory to verdict of not guilty because of insanity which continued to time of the trial under indictment charging defendant with murder of his sister-in-law shortly thereafter. Id. 43.).

IV

Our dissenting colleague contends that "the jurors were not instructed that in order to convict they all had to believe beyond a reasonable doubt that defendant had committed a particular act which constituted official misconduct. Without that instruction, we have no idea whether the jury's verdict was unanimous." In support of this proposition, he relies on United States v. Gipson, 553 F.2d 453 (5 Cir. 1977); Note, 91 Harv. L. Rev. 499 (1977); 3 La Fave and Israel, Criminal Procedure (1984) §23.7(f), at 50 (La Fave and Israel). The rationale of Gipson is the possibility that the jurors will agree that a defendant has done something illegal and is thus guilty, without agreeing which act or acts the defendant committed. 91 Harv. L. Rev. at 499. But "[s]uch 'patchwork' guilty verdicts have been held to meet State jury unanimity requirements by the majority of State courts which have considered the question." Ibid. (Citations omitted.) "Generally, state courts have not taken this approach." La Fave and Israel, §3.7(f) at 50. Gipson did not purport to deal with the procedures the states have adopted in "patchwork verdict situations." Id. at 504.

In Gipson, the defendant was convicted under 18 U.S.C. §313 which provides that "[w]hosoever receives, conceals, stores, barters, sells or disposes of any motor vehicle . . . knowing the same to have been stolen, shall be fined . . . or imprisoned . . ." Gibson at 455. The prosecutor presented evidence regarding all six prohibited acts. Id. at 559.

The trial court instructed the jurors that they could return a guilty verdict if every juror believed that the defendant had committed some prohibited act, even though the jury did not unanimously agree upon the particular act the defendant had perpetrated. 53 F.2d at 455, 459; 91 Harv. L. Rev.supra, at 499-500. Gipson "emphasized-that [it] was only reviewing the erroneous instruction and was not attempting to breach the shroud surrounding jury deliberation'." 553 F.2d at 457.

The problem in Gipson was that the jury was authorized to convict the defendant of violating the statute if each individual juror found that the defendant performed one of the six prohibited acts—receiving, concealing, storing, bartering, selling, or disposing—concerning a stolen vehicle. Under N.J.S.A. 2C:30-2a., the only proscribed act is that of "official misconduct" which is not defined in the New Jersey Code of Criminal Justice and proscribes only a "single offense."

The current rule in many states is that jury agreement that the defendant committed the 'single offense' prohibited by a statute precludes the need for jurors to choose further among materially different modes by which the crime may have been committed." Harv. L. Rev., supra at 504.

La Fave and Israel note that,

> many . . . statutes . . . often use a series of similar nouns, verbs or adverbs to describe a range of conduct simply because of the inherent limitations of the English language trying to described what is being proscribed. If the Gipson rule were applied in such circumstances, an intolerable situation would be created, as the court in that case recognized. [§@23.7(f) at 51-52.]

In the present case, considering the class as a group, the jury may very well have found that defendant "did engage in a continuing course of conduct which . . . endangered the welfare of children for whom she had a duty of care."

As a group, the defendants with several students in the back of classroom, looked at pornographic magazines and cut out pictures from the magazines and pasted them on blank pieces of paper or drew genitalia on the pictures in the magazines. Further,

the jury may have found that as a group, defendant told her students that she had sexual desires for the administrator and informed her class that one of her colleagues was a lesbian and that another injected drugs intravenously. She was charged as using foul language in the classroom and told the entire class that one of the 11 year old students was menstruating. There was also testimony that defendant encouraged a student to bring in a bottle of liquor which was kept in a closet with the magazines and a number of students saw the bottle and were aware of its presence in the classroom. In this respect, the jury may very well have rationalized that, as a group, defendant "endangered the welfare of the children."

At any rate, defendant was in no way prejudiced in her ability to prepare a defense. Wein, 80 N.J. at 500. "The various counts of the indictment considered as a whole, read in proper contextual association with one another, fully apprised defendant[] . . . of the character and nature [and specific facts to support the charge of official misconduct]" for which she was found guilty under count one of the indictment. Ibid. Further, all the facts concerning counts seven to 11 were before the jury. Although the jury found her not guilty on counts two, four and five and was unable to reach a verdict on the remaining counts, it may very well be that they felt that some element or the burden of proof was not met under the specific counts. Nevertheless, the entire factual pattern, which was before the jury, supported the charge of official misconduct under count one of the indictment.

Of course; in order to implement the holding of Gipson that the jury must unanimously find every material Component of actus rectus, special verdicts and special interrogatories are undoubtedly the most effective method of protecting Gipson rights. 91 Harv. L. Rev. at 503. "These devices,' however, are disfavored in criminal trials for prejudicing defendants by forcing the jury to focus on special propositions which is would be loath to deny publicly and which form a chain of argument leading ineluctably to conviction." Ibid.

Special verdicts "are disfavored in criminal trials for prejudicing defendants by forcing the jury to focus on specific propositions which it would be loath to deny publicly and which form a chain of argument leading ineluctably to conviction." Id. at 503, citing United States v. Spock, 416 F.2d 165, 181-182 (1 Cir. 1963). Although not prohibited in all cases, "special interrogatories as a tool in criminal trials are not condoned,in and their use [is] discouraged." State v. Simon, 79 N.J. 191, 204 (1979); accord State v. McAllister, 211 N.J. Super. 355, 363 (App. Div. 1986). The vice of special interrogatories in a criminal trial is their potential for destroying a jury's ability to deliberate upon the issue of guilty or innocence, free of extraneous influences. Simon 79 N.J. at 199. "This potential for harm inheres in the subtly coercive affect interrogatories can have upon the course of a jury's deliberations. They can constitute a form of mental conditioning which is antithetical to the untrammeled functioning of the jury." Id. at 199-200. "[D]irect control of a jury verdict and indirect judicial pressure upon a jury's deliberations can result from the use of special interrogatories" Id. at 200, citing United States v. Spock, 416 F.2d at 182.

In view of the fact that N.J.S.A. 2C:30-2a. prohibits the singular undefined act of "official misconduct," we are satisfied that there was no requirement to charge the jury that it had to believe beyond a reasonable doubt that defendant had committed a particular act which constituted official misconduct. Moreover, in order to implement such a charge, it would be necessary to propound special interrogatories which the courts are loathed to do.

V

Under the facts and circumstances of this case, we are satisfied that the verdict of official misconduct under count one must be sustained. The conviction under count one for violation of N.J.S.A. 2C:30-2a. is affirmed and the matter is remanded for further proceedings on those counts on which the jury was unable to reach a verdict.

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE COMMITTEE ON OPINIONS

RECORD IMPOUNDED

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
A-4181-86T2

STATE OF NEW JERSEY,
Plaintiff-Respondent,

v.

RUTH PARKER,
Defendant-Appellant.

COHEN, R.S., J.A.D., Dissenting

Defendant's conviction of official misconduct violates her constitutional right to a unanimous jury verdict.

Defendant's indictment charged her with misconduct in office as a teacher in that between November 1, 1985, and February 20, 1986, she "did engage in a continuing course of conduct which sexually abused, humiliated and otherwise endangered the welfare of children . . . " The State's proofs ranged over the fifteen weeks included within the indictment, and involved alleged incidences of sexual assault by defendant, and of other inappropriate conduct such as sharing with the children magazines full of nudes and semi-nudes in provocative postures, discussing her sexual desires for a colleague and the sex lives and drug habits of other colleagues, and using foul language and encouraging liquor to be present in the classroom.

The jury was invited by the judge and the prosecutor to consider the numerous and varied alleged incidents of inappropriate behavior in deciding the official misconduct charge.

The problem is that the alleged incidents ranged over fifteen weeks and included conduct of widely varying quality and gravity. The State's case was, as the majority correctly describes it, "replete with recantation, contradiction, inconsistencies and confusion." Most State witnesses were contradicted by other State witnesses and by their own prior statements or Grand Jury testimony. As a result, individual jurors could well have believed this part of the State's case and not that, while other jurors believed that part and not this. And the jurors were not instructed that in order to convict they all had to believe beyond a reasonable doubt that defendant had committed a particular act which constituted official misconduct. Without that instruction, we have no idea whether the jury's verdict wad unanimous.

For all we know, three jurors believed defendant used bad language on Day X but nine thought not; three others believed she brought Penthouse to school on Day X + 10 but nine thought not; three others believed she discussed her sexual longings on Day X + 20, but nine thought not; the final three thought she hid liquor in the closet on Day X + 30, but nine others thought that was too trivial to constitute official misconduct. The only way to avoid the danger of such a scattershot verdict of guilt is to tell the jury its verdict must be unanimous and that unanimity means agreement on at least one identified criminal act.

Another illustration. If a defendant is charged in Count I with a burglary in January and in Count II with another burglary in February, a jury hearing both counts might decide by 7 to 5 that defendant was guilty of one count and a different 7 to 5 that he was guilty of the other. Although all twelve jurors are for conviction on one count or the other, they still cannot convict of either. And the situation is not different if the indictment, similar to ours, charges defendant in one count with a continuous course of burglarious conduct in January and February. To convict, the jury must all agree that defendant committed the same criminal conduct. The only way the jury can know that is to be instructed to that effect. Otherwise, the patchwork, she-must-have-done-at-least-one-thing-on-the-list, verdict is a real and intolerable danger.

The problem is one that has not been previously discussed in a reported New Jersey opinion. It has been variously treated in the federal courts and other jurisdictions where criminal verdicts must be unanimous. I agree with the position first clearly announced by the Fifth Circuit Court of Appeals in United States v. Gipson, 553 F.2d 453 (5 Cir. 1977). Defendant was charged with violating a statute prohibiting receiving, concealing, storing, bartering, selling and disposing of a motor vehicle knowing it was stolen. The indictment recited each of the acts prohibited by the statute. The judge charged the jury that it could find defendant guilty without all of them agreeing on which of the prohibited acts defendant had committed.

The Court of Appeals reversed the conviction on the thesis that, where a statute can be violated by different acts, defendant's right to a unanimous jury verdict is violated unless the convicting jurors are in substantial agreement as to just what it was that defendant did. See Note, 91 Harv. L. Rev. 499(1977); 3 La Fave and Israel, Criminal Procedure, §23.7(f), p.50 (1984).

An earlier view is represented by United States v. Lennon, 246 F.2d 24 (2 Cir.), cert. den. 355 U.S. 836 (1957). There, a defendant charged with filing a false income tax return was faced with evidence that he both understated income and overstated deductions. Affirming the conviction, the Court of Appeals held that the criminal act was filing the false return, and that it was not necessary for the jury to have identified the source of the falsity—whether understatement of income or overstatement of deductions. In the present case, however, there was no one single criminal act charged, but rather a course of fifteen week's commission of wholly independent acts of alleged official misconduct.

In very recent years, the problem of patchwork criminal verdicts has been soundly and thoroughly confronted in United States v. Hernandez-Escarsega, 886 F.2d 1560 (9 Cir. 1989); United States v. Jackson, 879 F.2d 85 (3 Cir. 1989); United States v. Duncan 850 F.2d 1104 (6 Cir. 1988) and United States v. Beros, 833 F.2d 455 (3 Cir. 1987). Without extensive recital of the opinions, it is sufficient to say that those cases stand for the proposition that in the ordinary case a general instruction on jury

unanimity is sufficient to protect a defendant's constitutional rights, but that where there is a genuine possibility of jury confusion or of a conviction's resulting from different jurors' concluding that defendant committed different acts, the general instruction is not enough, and the judge must augment the instruction to ensure that the jury understands its duty to convict only if it unanimously agrees to a particular set of facts. See also United States v.Schiff, 801 F.2d 108 (2 Cir. 1986); United States v. Bouquett, 820 F.2d 165 (6 Cir. 1987); United States v. Eagle Elk, 820 F.2d 959) (8 Cir. 1987); United States v. McClure, 734 F.2d 484 (10 Cir. 1984).

This is such a case. The potential for confusion is plain. The official misconduct charge alleged a continuous course of action for 15 weeks. The multitude of State witnesses testified inconsistently with one another and with their own prior statements. The misconduct charge was tacked on to the more substantive counts of the indictment, and achieved independent decisional significance only when the State's witnesses fell apart and the jury became understandably uncertain. Also, understandably concerned about the kind of conduct generally attributed to defendant, the jury may well have been attracted to a charge that seemed expansive and vague enough to absorb and express the individual doubts each juror had about defendant's general behavior. It was the perfect setting for a patchwork verdict.

I am aware that defendant never asked for a specific unanimity instruction, and that an argument can well be made that the defect was thus waived. See United States v. Peterson, 768 F.2d 64 (2 Cir. 1985). I am also aware that defendant did not raise the issue before us. The omission of a proper instruction, however, cut deeply into defendant's significant constitutional right to a unanimous verdict, and could well have produced an improper outcome. I cannot say the error was harmless beyond a reasonable doubt.

Criminal verdicts must be unanimous in the federal courts. Andres v. United States, 333 U.S. 740, 748, 68 S. Ct. 880, 884, 92 L. Ed. 1055 (1948). The United States Constitution does not require criminal verdicts in State courts to be unanimous.

Apocaca v. Oregon, 406 U.S. 404, 92 S. Ct. 1628, 32 L. Ed.2d 184 (1972). However, in New Jersey, that requirement is imposed as a matter of State Constitutional law. State v. Cordasco, 2 N.J. 189, 202 (1949)

We can follow the lead of the United States Courts of Appeals on this issue, or decide that the New Jersey Constitution offers less protection here than the Sixth Amendment does in the federal courts. I know no warrant for that conclusion, however, and am persuaded by the soundness of the approach represented by the recent Court of Appeals decisions, especially in the case of an indictment count charging impropriety continuing for a long period of time.

The right to a unanimous verdict is best enforced by an instruction adequately informing the jury.what unanimity means in a factually complex case. This is especially important in cases like this, in which a count of an indictment perhaps inappropriately charges a continuing offense and thus may well be challengeable for duplicity,[1] which is the joining in a single indictment count of two or more separate offenses. State v. New Jersey Trade Waste Ass'n., 96 N.J. 8, 21 (1984); United Stated v. Starks, 515 F.2d 112 (3 Cir. 1975). Where essentially individual criminal events are charged in one count, without objection, the jury should not be permitted to base a conviction on their individual choices from a lengthy menu.

The use of special verdicts, to isolate and identify what the jury found was defendant's criminal conduct is no solution. The dangers and disadvantages of special verdicts in criminal cases is explored in 3 La Fave and Israel, Criminal Procedure, §23.7(d), p. 47 (1984). They are generally disfavored, and for good reason. State v. Simon, 79 N.J. 191, 204 (1979).

I would reverse and remand for retrial.

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[1] Compare State v. Witte, 13 N.J. 598 (1953), where the official misconduct of nonfeasance was charged as a continuing offense against a chief of police who allegedly willfully failed to enforce the gambling laws. Nonfeasance is by nature continuous, unlike the commission of a series of individual acts of misfeasance or malfeasance.

FILED SEPT 6, 1991

SUPREME COURT OF NEW JERSEY
M-24 September Term 1991

32,330

STATE OF NEW JERSEY,

Plaintiff-Respondent,

vs. ORDER

RUTH A. PARKER,

Defendant-Movant.

This matter having been duly presented to the Court it is ORDERED that the motion for reconsideration is denied.

WITNESS, the Honorable Robert N. Wilentz, Chief Justice, at Trenton, on this 4th day of September, 1991.

Stephen W. Townsend
CLERK OF THE SUPREME COURT

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, DC 20543

WILLIAM K. SUTER,
CLERK OF THE COURT

September 17, 1991

Mr. Dean Lynch
240 Mary Street, Suite #4
Hackensack, NJ 07601

Re: Ruth A. Parker v. New Jersey
Application No. A-202

Dear Mr. Lynch:

The application for bail pending filing and disposition of a petition for a writ of certiorari to the Supreme Court of New Jersey in the above entitled case has been presented to Justice Souter who on September 17, 1991, endorsed thereon following:

"Deny
David H. Souter
91791"

Very truly yours,
William K. Suter, Clerk
By

Christopher W. Vasil
Deputy Clerk

NOTE—FOR YOU INFORMATION: A copy of this letter has beeOsent to all interested parties shown on the attached notification list.

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION—CRIMINAL

STATE OF NEW JERSEY,	
Plaintiff,	HUDSON COUNTY INDICTMENT
RUTH PARKER,	INDICTMENT NO. 763-06-86
Defendant.	

The Grand Jury of the State of New Jersey, for the upon their oaths, present that:

COUNT ONE
(Official Misconduct—Second Degree)

RUTH PARKER

between on or about November I, 1985 and February 20, 1986, at the Township of North Bergen, in the County of Hudson, and within the jurisdiction of this Court, did commit the crime of official misconduct, that is, the said RUTH PARKER, with purpose to obtain a benefit for herself and to injure another, and the said RUTH PARKER being a public servant, to wit, a school teacher employed by the North Bergen Board of Education, did commit an act which related to her office but constituted an unauthorized exercise of her official functions, knowing that such act as unauthorized and was committed in an unauthorized manner, that is, the said RUTH PARKER did engage in a continuing course of conduct which sexually abused, humiliated and otherwise endangered the welfare of children while the said RUTH PARKER had a legal duty to care for the children and had assumed responsibility for their care, contrary to the provisions of N.J.S.A. 2C:30-2a, and against the peace of this State, the government and dignity of the same.

COUNT TWO
(Sexual Assault—Second Degree)

RUTH PARKER

on or about February 19, 1986, at the Township of North Bergen, in the County of Hudson, and within the jurisdiction of this Court, did commit an act of sexual contact upon H.Z. by intentionally touching the intimate parts of H.Z. for the purpose of degrading and humiliating H.Z. and sexually arousing and sexually gratifying the said RUTH PARKER, while H.Z. was less than 13 years old and the said RUTH PARKER was at least 4 years older than H.Z., contrary to the provisions of N.J.S.A. 2C:14-2b, and against the peace of this State, the government and dignity of the same.

COUNT THREE
(Sexual Assault—Second Degree)

RUTH PARKER

on or about February 13, 1986, at the Township of North Bergen, in the County of Hudson, and within the jurisdiction of this Court, did commit an act of sexual contact upon E.L. by intentionally touching the intimate parts of E.L. for the purpose of degrading and humiliating E.L. and sexually arousing and sexually gratifying the said RUTH PARKER, while E.L. was less than 13 years old and the said RUTH PARKER was at least 4 years older than E.L., contrary to the provisions of N.J.S.A. 2C:14-2b, and against the peace of this State, the government and dignity of the same.

COUNT FOUR
(Sexual Assault—Second Degree)

RUTH PARKER

between on or about January 2, 1986 and February 20, 1986, at the Township of North Bergen, in the County of Hudson, and within the jurisdiction of this Court, did commit an act of sexual contact upon S.S. by intentionally touching the intimate parts of S.S. for the purpose of degrading and humiliating S.S.and sexu-

ally arousing and sexually gratifying the said RUTH PARKER, while S.S. was less than 13 years old and the said RUTH PARKER was at least 4 years older than S.S., contrary to the provisions of N.J.S.A. 2C:14-2b, and against the peace of this State, the government and dignity of the same.

COUNT FIVE

(Sexual Assault—Second Degree)

RUTH PARKED

between on or about November 1, 1985 and February 20, 1986, at the Township of North Bergen, in the County of Hudson, and within the jurisdiction of this Court, did commit an act of sexual contact upon R.S. by intentionally touching the intimate parts of R.S. for the purpose of degrading and humiliating R.S. and sexually arousing and sexually gratifying the said RUTH PARKER, while R.S. was less than 13 years old and the said RUTH PARKER was at least 4 years older than R.S., contrary to the provisions of N.J.S.A. 2C:14-2b, and against the peace of this State, the government and dignity of the same.

COUNT SIX

(Attempted Sexual Assault—Second Degree)

RUTH PARKER

between on or about January 2, 1986 and February 20, 1986, at the Township of North Bergen, in the County of Hudson, and within the jurisdiction of this Court, did attempt to commit an act of sexual contact upon R.A.S. by attempting to intentionally touch the intimate parts of R.A.S. for the purpose of degrading and humiliating R.A.S. and sexually arousing and sexually gratifying the said RUTH PARKER, while R.A.S. was less than 13 years old and the said RUTH PARKER was at least 4 years older than R.A.S., contrary to the provisions of N.J.S.A. 2C:14-2C(5) and N.J.S.A. 2C:5-1, and against the peace of this State, the government and dignity of the same.

COUNT SEVEN

(Endangering Welfare of Children—Third Degree)

RUTH PARKER

between on or about November 1, 1985 and February 19, 1986, at the Township of North Bergen, in the County of Hudson, and within the jurisdiction of this Court, while having a legal duty for the care of H.Z. and having assumed responsibility for the are of H.Z., did engage in sexual conduct which would impair and debauch the morals of H.Z. and did cause H.Z. harm that would make H.Z. an abused and neglected child, as defined in R.S. 9:6-1, R.S. 9:6-3 and P.L. 1974, c. 119, sec. 1 (C.9:6-8.21), contrary to the provisions of N.J.S.A. 2C:24-4a, and against the peace of this State, the government and dignity of the same.

COUNT EIGHT

(Endangering Welfare of Children—Third Degree)

RUTH PARKER

between on or about November 1, 1985 and February 19, 1986 at the Township of North Bergen, in the County of Hudson, and within the jurisdiction or this Court, while having a legal duty for the care of T.W. and having assumed responsibility for the care or T.W., did engage in sexual conduct which would impair and debauch the morals of T.W. and did cause T.W. harm that would make T.W. an abused and neglected child, as defined in R.S. 9:6-1, R.S. 9:6-3 and P.L. 1974, c. 119, sec. 1 (C. 9:6-8.21), contrary to the provisions of N.J.S.A. 2C:24-4a, and against the peace of this State, the government and dignity of the same.

COUNT NINE

(Endangering Welfare of Children—Third Degree)

RUTH PARKER

between on or about November 1, 1985 and February 19, 19866 at the Township of North Bergen, in the County of Hudson, and within the jurisdiction of this Court, while having a legal duty for the care of R.S. and having assumed responsibility for the care of R.S., did engage in sexual conduct which would impair and debauch the morals of R.S. and did cause R.S. harm that would make R.S. an abused and neglected child, as defined in R.S.

9:6-1, R.S. 9:6-3 and P.L. 1974, c. 119, sec. 1 (C.9:6-8.21), contrary to the provisions of N.J.S.A. 2C:24-4a, and against the peace of this State, the government and dignity of the same.

COUNT TEN

(Endangering Welfare of Children—Third Degree)

RUTH PARKER

between on or about November 1, 1985 and February 19, 1986 at the Township of North Bergen, in the County of Hudson, and within the jurisdiction of this Court, while having a legal duty for the care of E.L. and having assumed responsibility for the care of E.L., did engage in sexual conduct which would impair and debauch the morals of E.L. and did cause E.L. harm that would make E.L. an abused and neglected child, as defined in R.S. 9:6-1, R.5. 9:6-3 and P.L. 1974, c. 119, sec. I (C.9:6-8.21), contrary to the provisions of N.J.S.A. 2C:24-4a, and against the peace of this State, the government and dignity of the same.

COUNT ELEVEN

(Endangering Welfare of -Children—Third Degree)

RUTH PARKER

between on or about November 1, 1985 and February 19, 1986 at the Township of North Bergen, in the County of Hudson, and within the jurisdiction of this court, while having a legal duty for the care of I.V. and having assumed responsibility for the care of I.V., did engage in sexual conduct which would impair and debauch the morals of I.V. and did cause I.V. harm that would make I.V. an abused and neglected child, as defined in R.S. 9:6-1, R.S. 9:6-3 and P.L. 1974, c. 119, sec. 1 (C.9:6-8.21), contrary to the provisions of N.J.S.A. 2C:24-4a, and against the peace of this State, the government and dignity of the same.

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Robert G. Stevens
Deputy Director
Division of Criminal Justice

A TRUE BILL

FILED OCTOBER 4, 1990

SUPREME COURT OF NEW JERSEY
C-137 September Term 1990

32,330

STATE OF NEW JERSEY,

Plaintiff-Respondent,

vs. ON PETITION FOR CERTIFICATION

RUTH PARKER,

Defendant-Petitioner.

To the Appellate Division, Superior Court,

A petition for certification of the judgment in A-4181-86T2 having been submitted to this Court, and the Court having considered the same;

It is ORDERED that the petition for certification is granted, limited to the issue of whether the act of wrongdoing alleged by the State in defendant's indictment constituted a violation of N.J.S.A. 2C:30-2a.

WITNESS, the Honorable Robert N. Wilentz, Chief Justice, at Trenton, this 2nd day of October, 1990.

STEPHEN W. TOWNSEND
CLERK OF THE SUPREME COURT